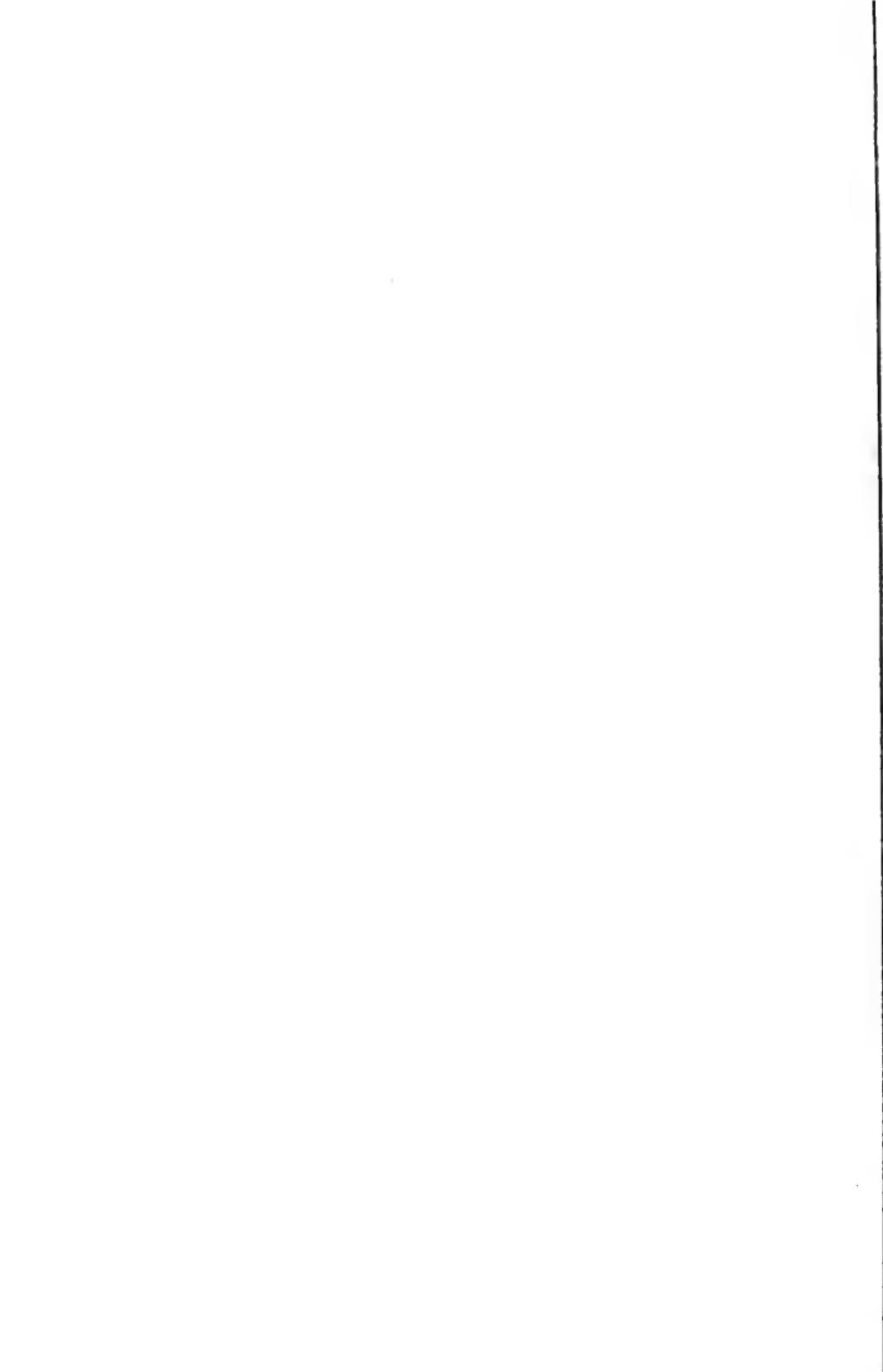






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THE STATE AND FEDERAL  
CONSTITUTIONS OF AUSTRALIA







SIR HENRY PARKES

# THE STATE AND FEDERAL CONSTITUTIONS OF AUSTRALIA

BY

KARL R. CRAMP, M.A.

Examiner, Department of Public Instruction, Sydney ;  
Late Senior Lecturer in History, Sydney Teachers' College

WITH AN INTRODUCTION BY PROFESSOR WOOD  
University of Sydney

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## PREFACE

Living as we do in the age of democracies with their institutions ever growing and undergoing modification, but withal rooted in the past, it seems essential that the schools—the training ground of our future citizens—should realise to the full their responsibility to the society in whose midst they flourish, and should anticipate the day when their present scholars will receive the full rights and obligations of citizenship. This relation of the school to society has been largely recognised of late years, and school curricula have been accordingly modified in both the primary and secondary departments. Not only have the industrial and commercial requirements of the community been kept in view, but definite instruction has been given in subjects of a more directly civic significance. Lessons in history and lessons on the public institutions of our own country have been given largely in relation to one another. In this way a dynamic as well as a static view of society is being developed. A democratic people cannot afford to disregard the study of the foundations and erection of its institutions if it hopes to comprehend them in their present form. A desire to assist towards a more intelligent and

potent citizenship—the outcome of more thoroughly organised knowledge—leads me to offer this account of the origins, growth and present characteristics of Australian political institutions.

It is not expected that the younger pupils of our schools should read this book. It suffices that they are enjoying some form or other of concrete civic instruction in reproducing public institutions in their own school and class organisations, and in listening to stories about Englishmen who struggled and died in the cause of freedom, and Australians who worked zealously for the constitutional emancipation and dignity of their country. This is an admirable preparation for a more formal study of constitutional machinery. It is as a first course in such a formal study that this work is intended. The youth of the upper secondary school, about to launch out from the shelter of the school into the broad open sea of life, has developed a fund of historical knowledge sufficient to engender a keen interest in public institutions and political questions. Experience leads one to believe that youths of from sixteen to eighteen years of age have as intelligent a grasp of such subjects as the average adult, particularly as they have the advantage of the guiding hand of a specially equipped teacher. Probably too, teachers and more advanced students, as

well as the general reader, may find some attraction and value in the book. But no attempt is made to meet the requirements of those whose interest and business it is to examine with any thoroughness the nature and details of our federal constitution. This class of student must have recourse to more complete and formal treatises such as Quick and Garran's *Annotated Constitution of the Australian Commonwealth*.

In order to encourage comparative methods of study and give a more thorough grasp of the principles underlying our own constitution and a greater appreciation of the statesmanship at work in its drafting, the general features of other federal constitutions have been outlined. A study of ancient and mediaeval federations may serve to emphasise the greater elaboration and finer workmanship of modern federal machinery. The appendices will allow direct reference to original authority and practically indicate some of the sources of the historian's information. They may be passed over by those who desire an uninterrupted account of constitutional progress. Chapter X., though political rather than constitutional, will yet serve to show the constitutional machinery at work, and perhaps give fuller meaning to the preceding chapters on Australia.

It gives me much pleasure to acknowledge

my great indebtedness to Professor Wood, M.A., of the University of Sydney, who read through the manuscript and has honoured my work by contributing the introductory chapter. I am also under obligation to Mr. J. D. St. Clair Maclardy, M.A., Chief Examiner, Department of Public Instruction, Mr. W. J. Elliott, M.A., Inspector of Secondary Schools, and Mr. A. W. Jose, for their careful perusal of the manuscript; to Mr. J. Garlick, Officer-in-charge, Local Government Department, who read the section on Local Government; to Mr. H. Wright, Curator of the Mitchell Library, who smoothed my way in the matter of illustrations; to Mr. F. Walsh, Parliamentary Librarian, for help in sundry ways, and especially to my wife, whose assistance, criticisms and reading of the proofs have been a material factor in the production of this little work.

In conclusion, may I express the hope that the book will assist towards the development of a well-informed and intelligent Australian sentiment, not antagonistic to, but rather enriching, an equally well-informed and rational Imperialism.

KARL R. CRAMP.

*May, 1913.*

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## INTRODUCTION

The political story of Australia is not an obviously interesting story. Great things have happened, but they have happened gradually, and without observation. There have been no wars of conquest, for a handful of people were dowered with a continent; no wars of defence, for the continent was protected by the fleet of Nelson; no racial conflict, for the people were as entirely British as the people of the British Isles. The great battles of freedom had been already fought and won before Australia came of age. The principles of Democracy and Liberty, of Colonial Home Rule and Responsible Government, had been recognised as essential principles of British civilisation. Australians had not to fight; they had only to ask, and to argue. There were mistakes and delays and friction; but in general, Australia got the full privileges of British citizenship as soon as Australia was ready to use them with advantage to herself. Our story has not been the story of a people striving to be free. It has been the story of an infant society gradually growing into the freedom that was recognised to be its natural birthright.

The interest of a story of this sort does not lie on the surface. We miss the great battles

for great causes; the heroisms and the martyrdoms; the inspiration of the lives of famous men. And yet the interest of human things is in our story of the gradual evolution of a little British society learning at the ends of the earth to live the British life in the midst of unprecedented difficulties. The story begins in the depths of the Nether World. It is as if a deliberate experiment was being tried to test the quality of the British race in the most unfavourable circumstances that could be invented. We have the careful selection of the unfit, a society of criminals and the government of a prison. Then, very gradually, change and progress begin. Free colonists arrive. Criminals become emancipists. The first generation passes and gradually a homogenous British society is formed. British ideas find political expression. Despotism becomes limited and tempered by growing respect to Public Opinion. Martial Law gives way to the Jury. The Press becomes free. The Governor is instructed to act with a Council of Notables. To these, at a later date, are added a majority of elected representatives of the people, and at last a constitution is established by which the colonists obtained full rights of self-government.

And meanwhile great things have happened. The huge unknown continent of the South has been conquered by the explorer and

the pioneer. War has been waged, not with men but with nature: and no war ever waged has made more demand on human courage, endurance, self-reliance, sagacity. One by one new colonies have been founded, at points so far distant that they have been virtually islands in the midst of the sea of bushland, each with its distinct interests, customs and institutions.

Then these colonies are drawn together. They are conscious of common origin and race, of common ideas and institutions, of common interests and aims. They realise that they are tiny garrisons holding the immense frontier of the white world in face of Asia. They wish to preserve the individuality of each colony. But they wish to become united for those purposes which are common to all. Their statesmen prove of calibre to solve one of the most difficult and complex problems of practical politics. And the Federal Constitution places a nation in possession of a continent.

Such are the outlines of our political story. We miss in it the fascination of great personal characters, the romance and excitement of great personal exploits, the "crowded hour of glorious life." It is the story, not of Individuals, but of the Race: the story of the slow, patient, strenuous, enduring work of generations of average British men and British women, intent on doing the next thing, and on doing it well. No individual stands distinct

and conspicuous above the crowd. But the result of the long day's work, when we survey it at the close and as a whole, is one of the great exploits of the British Race.

In this little book, Mr. Cramp has essayed to draw the outlines of this story in its constitutional aspect. In a study of this aspect in isolation, much is of necessity sacrificed: for the evolution of constitutional machinery is of little meaning apart from a knowledge of the men who made the machinery and who used it. But to one who has, by previous study, acquired some good knowledge of general Australian history, there is great interest and use in a renewed survey of the ground from the constitutional point of view. To him each change in institutions will be the expression of a change in the character and ideals of the people; and in the story of the making of the Australian Constitution he will read the story of the making of the Australian Nation.

G. A. WOOD.

## CHAPTER I.

### CONSTITUTIONAL DEVELOPMENT IN NEW SOUTH WALES.

1788-1842.

The story of the growth of self-government in the Australian Colonies should be of considerable interest to all present and prospective citizens of Australia. It affords instances of the main types of British dependencies from the Crown Colony governed more or less completely by the British Government, to the adult and autonomous State connected with the Mother Country on terms of almost complete equality. It also affords a valuable study of the attempts to effect a reconciliation between the forces signified in the phrase *Imperium et Libertas*. The problem exercising the minds of British and colonial statesmen during the nineteenth century, and still awaiting its ultimate solution, is how to preserve the Imperial connection (*Imperium*) and at the same time give the greatest possible measure of political freedom (*Libertas*) to the colonies. The theory that colonies drop away from the parent country like ripe fruit from a

tree upon reaching maturity made *Imperium* and *Libertas* appear irreconcileable. On the whole, however, British statesmen were convinced that such was not the case, and the completeness of their convictions is reflected in the large degree of liberty which the English Parliament has granted to her colonies, within the last century. "Whilst continuing," said Lord John Russell, in a despatch referring to the granting of self-government to the Australian Colonies in 1855, "to pursue their present independent course of progress and prosperity I have the fullest confidence that they (*i.e.*, the Colonies) will combine with it the jealous maintenance of ties thus cemented alike by principle and feeling."\*

In the development of full governmental powers in the Australian Colonies there are, The main stages of speaking generally, five main stages. These development. stand out most clearly in the case of New South Wales. We will therefore examine this development in the mother colony in some detail, and content ourselves with a more general survey of the modifications in the other States.

(I.) During the first period, extending from 1788 to 1823, New South Wales was a Crown

\* Parliamentary Papers 1855. Cf. Durham, Report on Canada, pp. 229, 243, and Egerton Brit. Col. Policy, pp. 4, 300-1; *Vide infra*, Chapter III, p. 54. Contrast the views of another section who regarded the granting of political freedom to the Colonies as a smoothing of the way to a separation which, in their opinion, was in any case inevitable.

Colony of the extreme military type. It was under the jurisdiction of a Governor who exercised practically absolute powers. He was assisted by naval and military officers.

(II.) From 1823 to 1842 the colony remained under Crown rule, but this control was relaxed to the extent of allowing the Governor a nominated Legislative Council with advisory powers.

(III.) Between 1842 and 1856 partially Representative Institutions were established, and the Legislative Council, which had previously consisted entirely of nominees, now had a proportion of its members elected by an enfranchised section of the community.

(IV.) Since 1856 the people of the colony have exercised control not only over the Legislature, but also through the Legislature over the Executive. In other words, Responsible Government has obtained since that year.

(V.) In 1901 New South Wales entered into a federal union with the other States of Australia, and a further extension of the privileges of self-government was granted to the central authority.

We will now discuss these stages in detail.

#### THE ESTABLISHMENT OF THE COLONIES.

In 1784 the Imperial Parliament passed an New South Wales Act "for the effectual transportation of felons

and other offenders." The Act authorised the Privy Council to appoint places for this purpose, and accordingly two years later New South Wales was designated such a place. New South Wales was defined to include all Australia east of the 135th meridian of east longitude, Van Diemen's Land, and the adjacent Pacific Islands. The Governor's Commission did not grant him jurisdiction over the islands of New Zealand; but as soon as British subjects settled there, a more or less vague understanding arose that, if any authority was to be exercised over the settlers, it should be exercised by the Governor of New South Wales. In 1817 he was given jurisdiction which allowed him to interfere when necessary between the British settlers and the Maoris. But it was not till 1840 that New Zealand became definitely a dependency of New South Wales, and then for a few months only. Including New Zealand, the area ruled over by the Governors of New South Wales exceeded one and a half million square miles.

The other Colonies.—The western part of Australia remained unannexed for forty years. In 1826 a small settlement was effected at King George's Sound. In 1825 the western boundary of New South Wales was shifted west to the 129th meridian. Four years later (1829) a settlement was planted on the Swan River, and to this young colony the control of the King

George's Sound settlement was soon transferred. Van Diemen's Land had by this time been proclaimed a separate colony (1825). South Australia was carved out of New South Wales territory in 1836, which was still further reduced by the separation of New Zealand in 1841. This left New South Wales with a peculiar territorial formation. To ascertain this, draw a map of Australia and divide it into two parts at the 129th meridian. Then insert the 132nd meridian from the Great Australian Bight till it reaches the 26th parallel, proceed along this parallel to the 141st meridian and then turn southwards till the sea is reached. It will thus be seen that South Australia was bordered on three sides—east, north and west—by New South Wales, and that the latter colony then consisted of what now constitutes the three eastern States, the Northery Territory and a slice south of the 26th parallel wedged between South Australia and Western Australia (*i.e.*, between the 129th and 132nd meridians). This latter narrow and unpopulated slice was so far removed from Sydney, the seat of Government, that it was generally called "No Man's Land."

By the separation of Victoria in 1851 and Queensland in 1859, the area of New South Wales was still further reduced. That part which now constitutes the State was geographically cut off from "No Man's Land"

## 6 CONSTITUTIONAL HISTORY OF N.S.W.

and the Northern Territory, which, however, still retained their political connection with the parent colony. Consequently a readjustment of boundaries was necessary, and between the years 1861 and 1863 the two latter territories were transferred to South Australia, and the western boundary of Queensland was formed by the 141st meridian as far north as the 26th parallel, and thence by the 138th meridian. Previously it had been the 141st meridian throughout.

Since 1863 no new colonies have been formed, but Papua became a protectorate of Great Britain in 1884 and a Crown Colony associated with Queensland in 1888. It was subsequently handed over to the Commonwealth Government (1906) which has also more recently (1911) secured from South Australia the control of the Northern Territory. The boundary between South Australia and the Northern Territory runs along the 26th parallel of south latitude.

### NEW SOUTH WALES—The First Period.

The First Stage—  
The Powers of the  
early Governors.

In 1788 the colony of New South Wales commenced its existence under Governor Phillip, who had been appointed Governor and Vice-Admiral. The Government of a State has to do with the administrative, legislative and judicial regulation of its public affairs.



AUSTRALIA AND NEW ZEALAND, 1786-1836.



AUSTRALIA AND NEW ZEALAND, 1836-1851.





AUSTRALIA, 1851-1859.



AUSTRALIA, 1859-1861.





AUSTRALIA, 1861-1906.



## AUSTRALIA SINCE 1906.



"The legislature makes, the executive executes and the judiciary construes the law."\* In the early years of the colony all three functions were monopolised by the Governor. The administrative powers were in his hands, though a few officials, such as the Lieutenant-Governor and the Judge-Advocate, were appointed and remunerated by the Home Government. These officials were often consulted by the Governor, but apart from him had no authority. They received their instructions from him, and were subject to dismissal at his hands. The Governor also controlled the finances and was thus virtually the Colonial Treasurer. It was his duty to make the best use of the funds provided by the British Government, for at this time the colony was financed by England, and it was not till 1819 that limited powers to impose local taxation in the shape of customs duties on spirit, tobacco, and certain other imports were conferred on the Governor. The Governors, however, had been accustomed to exercise a questionable right to impose such duties, and an Act was passed in that year to indemnify them for the illegality and to allow the duties to be continued or discontinued at the Governor's discretion.†

To return to 1788, the Governor could issue

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\* W. H. Moore, "The Commonwealth of Australia," p. 25.

† 59 Geo. III., 114, July, 1819.

ordinances for the good government of the colony, order summary punishment for offenders, and even modify English law when necessary. His duties indeed were various and manifold. "He was not only vicegerent charged with the awful power of life and death; on him fell also the care of the infant settlement in its most trivial affairs. For him it would be to negotiate bills in England, to influence shipments of foods and necessaries, to distribute land, to foster agriculture, to settle disputes. He was himself the local Court of Appeal. From no petty trifle could he escape; from no high duty could he shrink."<sup>\*</sup> Jenks attributes to this absolute dependence of the community on the Governor for everything from justice to rations, the later impulse to State Socialism.<sup>†</sup>

The Governor's power was thus in effect absolute. True, he was responsible to the Imperial Government, and received instructions to observe certain laws: but distance from England practically gave him *carte blanche*. The force of public opinion as a restraining influence was almost entirely absent, as is evident the moment we take into account the character of the population. The presence of

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\* Rusden, "History of Australia," I., 24.

† Vide Jenks, "History of the Australasian Colonies," p. 149. Cf. Wise, "The Commonwealth of Australia."

convicts necessitated that New South Wales should remain for many years a Crown Colony of the military type. A civilian Governor was not appointed until the second half of the nineteenth century. The earlier Governors, Phillip, Hunter, King and Bligh, were connected with the navy, whilst Macquarie, Brisbane, Darling, Bourke and Gipps were military officers.

The military character of the settlement determined the system of law. A Court of <sup>The establishment of Courts.</sup> Criminal Jurisdiction was established. It consisted of the Judge-Advocate and six naval or military officers selected by the Governor. Offences against the English criminal law were taken cognisance of. In effect it was a court martial that dispensed justice. A Civil Court was also created, consisting of the Judge-Advocate and two inhabitants. In all cases of appeal the Governor, assisted by the Judge-Advocate, was the final authority.

### JUDICIAL CHANGES IN 1814.

About a quarter of a century after the foundation of the colony (*i.e.*, 1814), the Civil and Criminal Courts, both of which had hitherto been under the Judge-Advocate, were put under separate control and made independent of one another. Two classes of civil courts were established, the *Supreme Court* and the

*Governor's Court.* The former (consisting of a judge appointed by the Crown and two magistrates appointed by the Governor) heard cases in which a sum of money greater than £50 was involved. When the amount exceeded £300, appeal to the Court of Appeal, consisting of the Governor and the Judge-Advocate was allowed; if the amount exceeded £3,000, appeal could be made to the Privy Council in England. The *Governor's Court* consisted of the Judge-Advocate and two inhabitants appointed by the Governor (in Van Diemen's Land a Deputy-Judge-Advocate and two inhabitants). In constitution, therefore, it was a continuation of the original Civil Court, but its jurisdiction was limited to cases concerning amounts less than £50. The jury system, as we understand it, was non-existent in both civil and criminal cases, whilst the Judge-Advocate's position was such as to leave the absolute purity of justice open to question. It was his duty as Advocate to initiate Crown prosecutions, and then as Judge to decide the cases. To acquit (or non-suit) was virtually to decide against his own prosecution.

#### NEW SOUTH WALES JUDICATURE ACT (1823).

The Second Stage Towards the end of Governor Macquarie's term of office, the dissatisfaction expressed

against the Governor's autocratic administration led to the appointment of Commissioner Bigge to enquire into the question. One outcome of Bigge's report was the first constitutional charter for New South Wales, whereby "law was substituted for caprice."<sup>\*</sup> By the "New South Wales Judicature Act"<sup>†</sup> passed by the Imperial Parliament in July, 1823, and the "Charter of Justice" issued in accordance with it, the initial steps towards the attainment by the colonies of the right to govern themselves was taken. The new Constitution, it is well to observe, was in conformity with the spirit embodied in the Quebec Act of 1774, which had granted to the Canadians (who were then mostly of French nationality) the privilege of a nominated Council. The declared purpose of the Act of 1823 was to provide for the effectual government and administration of justice. It authorised the Governor to form a Council to assist him, which should have "power and authority to make laws and ordinances for the peace, welfare and good government" of the colony. It also provided for the erection of Van Diemen's Land into a separate colony (which was effected in 1825), and for the administration of the two colonies on practically similar lines. A Legislative Council was to be created for

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\* Rusden, "History of Australia," I., 564.

† 4 Geo. IV., cap. 96. *Vide Appendix to Chapter I.*

The first Legislative Council of each colony, to consist of five, six or seven persons appointed by the Crown. But as the Colonial Office in England usually depended upon the Governor's advice, the power of appointment was practically vested in him. It was thus essentially a nominee Council. The powers of this Legislative Council were not, of course, by any means so extensive as the corresponding body exercises at the present time. In fact, it had no independent right to legislate. Its powers were little more than advisory. In the first place, the initiation of legislation rested still with the Governor, who also presided over the Council. Secondly, he practically retained an independent power to legislate, inasmuch as, if he deemed it necessary, and was supported by at least one Councillor, he could issue an ordinance directly contrary to the will of the majority of the Councillors. In case of rebellion or apprehended rebellion he could act even against a unanimous Council. True, no ordinance could be published until it had first been submitted to them, and they, if they wished, could record their dissent. But the dissent had little or nothing behind it to render it effective. Thirdly, no proposal could even be submitted until the Chief Justice first declared it consistent with English law. Consequently, both the Governor and the Chief Justice dealt with proposed legislation before the Council dis-

cussed it at all. Finally, the British Parliament had the right to revise all laws and ordinances approved of by the Council, and the veto still remained with the Crown. Thus, the Legislative Council was far from enjoying anything like legislative independence.

But despite all these restrictions the establishment of the Council is a prominent landmark in the history of the colony's constitutional progress. It meant that military authority was about to give place to that of civilians.\* The Council could freely criticise proposed ordinances and money bills. It could levy taxes, though it had no control over the customs or land revenue. Indeed, after 1827 it fell to the lot of the Council to finance the civil administration, since the British Government declined to shoulder the whole financial burden of a colony in which the proportion of free settlers to the convicts was continually on the increase. It is well to observe, however, that all returns from taxes imposed on the colonists were to be used purely for the benefit of the colony, and the Governor was directly forbidden by Clause 27 of the Act to levy any tax or duty except for local purposes. The Imperial Parliament had thus extended to New South Wales the privileges of an Act passed in 1778 and popu-

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\* *Vide Rusden, "History of Australia."* I., 364.

larly termed “the Magna Charta of the British Colonies,” by which she had surrendered her right to secure an Imperial revenue from her colonies or to tax them at all except for the purpose of regulating commerce.

The Executive Council.

The Legislative Council must be distinguished from the Executive Council. The latter body was appointed to assist the Governor in the general administration of the Colony, and may be regarded as the predecessor of the Cabinet. It came into existence on the 20th December, 1825, when Governor Darling issued a proclamation appointing the Lieutenant-Governor, the Chief Justice, the Archdeacon, and the Colonial Secretary as members of such a body. As a matter of fact, a body with many of the functions of an Executive Council had for long assisted the Governor in his public duties, though it did not enjoy the title or prestige of such a Council. Henceforth it was to consist of a number of men whose advice the Governor sought on occasions, though he left himself free to accept or reject it at his own discretion. Yet the existence of this body made the responsibility of the Governor greater, especially on those occasions when he ignored its advice. For, if subsequent issues did not justify his neglect of its suggestions, he was liable to greater censure from the Colonial Office. The establishment of the Executive

Council was a step of considerable importance. "By affording the principal officials a constitutional opportunity of discussing together the general affairs of the colony, and of tendering independent and collective advice, the institution of the Executive Council gave a powerful impulse to the spread of a wholesome public opinion, which is one of the essential prerequisites of self-government."\*

Public interest and public opinion would be *Significance of the* still further stimulated by the formation of *Changes.* the Legislative Council. Free criticism develops civic intelligence, and paves the way for the granting of the coveted self-government. It is for this reason that we must regard the change of 1823 as a distinct step towards responsible government. Of course, it was only a single step, and from one point of view, a small step too, for though the members of the Executive Council were in 1825 also members of the Legislative Council,† there was no constitutional connection between the two bodies. The former was not answerable in any way to the latter. Yet it was this little step that provoked public opinion into vigorous agitation for further endowments of political freedom, and thereby hastened the day when the right of the inhabitants to

\* Jenks, "History of Australasian Colonies," p. 155.

† The Legislative Council in December, 1825, consisted of the Lieutenant-Governor, the Chief Justice, the Archdeacon, and the Colonial Secretary, together with John McArthur, Robert Campbell and Charles Throsby.

influence the constitution of the Legislative Council should be recognised.

Judicial Reforms of 1823. In the same year (1823) further reform was effected in the judicial administration. Empowered by the Imperial Act of that year, the Crown issued its "Charter of Justice." Forbes was appointed as the colony's first Chief Justice, and the offices of Judge and Advocate ceased to be occupied by the one individual. Greater purity in the administration of justice was thus ensured. As a natural corollary, the Chief Justice took the place of the Judge-Advocate as the Governor's colleague in the Court of Appeal. The jurisdiction of the Supreme Court (to consist in future of two or three Judges) was made to extend over civil and criminal cases in New Zealand and the Pacific islands. Civil actions were heard by one or more judges and two magistrates. An advance towards the jury system was made in that, if the parties concerned in a civil case so desired, they could be heard before a jury of twelve freeholders. The chief qualification of a juror was the possession of fifty acres or of a dwelling worth £300. Criminal trials were conducted before a judge and seven military officers. It is interesting to notice here that Forbes, vindicating the cause of the Emancipists and taking advantage of a verbal defect in the Act of 1823, held that jurors could be

The Juries.

empanelled at Courts of Quarter Sessions. The fear that ex-convicts would preponderate among such jurors, led to the vetoing of Forbes' decision by the Imperial Parliament.

The privilege of a civilian jury in criminal cases was thus still denied the colony. Yet a forward step had been taken in that both magistrates (in civil cases) and military officers (in criminal cases) were subject to challenge, whilst the judges were themselves of civilian rank. The right of challenge constitutes one of the essential features of the jury system, for it is by the exercise of such right that a defendant can protect himself from a biassed jury.

In addition to the Quarter Sessions which *Court of Requests.* were at this time constituted, the Governor was empowered to establish local courts known as "Courts of Requests" to consider claims up to £10. Appeals to the Supreme Court were limited to cases involving at least £500.

#### MODIFICATIONS IN 1828.

The Act of 1823 remained in force until 1828. Then, owing largely to colonial agitation, in which young Wentworth figured prominently, certain modifications were introduced into the Constitution. The Legislative Council was numerically strengthened. In future it was to consist of from ten to fifteen <sup>Improved position of the Legislative Council.</sup>

members, thus admitting an increased proportion of the unofficial class. Macarthur, Blaxland and Captain Phillip P. King, R.N. (son of Governor King) were amongst the unofficial members. But the members were still nominated by the King. The initiation of legislation still remained with the Governor, as no law could be made unless it had first been laid before the Council by His Excellency. The members held their seats at his pleasure, and the administration was still completely independent of the Council. At first sight, little advance seemed to have been made. But the increased numerical strength of the body ensured a greater respect for its opinions, and thus the Governor's power to act in defiance of the expressed will of the majority of the Council was indirectly restricted. The Chief Justice's power of veto was also reduced. In 1823 he had to decide the validity of a proposed law *before* it was presented to the Council. The test of validity was now to be applied at a later stage, and by the judges as a whole. The power of the Supreme Court was thus restricted to a mere protest against the validity of a measure *after* it had been passed, while the disputed law could be enforced even against the judge's protest until the Imperial Government had had time for a final decision.

A further advance was also made in the administration of justice. The judicial clauses

of 1823 were amended so as to clear the way Changes in the for the extension of the regular jury system Jury System. to criminal cases. The colonial legislatures could adopt it whenever the Crown (advised by the Privy Council, and without further reference to the Imperial Parliament), saw fit to grant them the power to legislate on the subject. But meanwhile, as the parties interested in civil cases had lost the right of claiming a jury of freeholders\* unless the Court itself sanctioned it, and all criminal cases were still tried before military juries in both the Supreme and the Quarter Sessions Courts, the establishment of a genuine civilian jury system seemed further away than in 1823. The fear that ex-convicts might be chosen as jurymen led the "Exclusives" to oppose the establishment of juries, and the Emancipists were compelled to submit for a while longer. However, progress was made in 1832, when trial by jury was applied to certain crimes and misdemeanours. In cases wherein the interest or reputation of any military or naval officer, or of the military or naval bodies generally was concerned, it was incumbent on the Court to direct that the accused should be tried before a jury of twelve civil inhabitants.† Emancipists were qualified to serve on criminal

\* This backward step was probably due to Chief Justice Forbes' action in attempting to force on the development of the jury system. *Vide pp. 16-17.*

† 2 WILL. IV., N.S.W., No. 3, 3rd Feb., 1832.

juries, provided they possessed freehold property to the value of £300, or had an annual income of £30.\* Seven years later it was felt that as the colony "hath greatly increased in population, and a sufficient number of respectable persons qualified to act as jurors is to be found in all parts of the said colony," it was in a position to dispense with military juries altogether (1839.) Consequently, "all crimes, misdemeanours and offences" were to be "tried by a jury of twelve of the inhabitants of the colony *only* . . . and the trial of offences by seven commissioned officers" was to "cease and determine." †

Five years later (1844) a slight modification was made in the conduct of civil cases in that the system of magisterial assessors was dispensed with altogether, in favour of a jury of four, or, if required by either party, of twelve civilians.

**Other Modifications.**

One or two other reforms, effected in 1828, remain to be noticed. The intermediate Courts of Appeal (consisting of the Governor and the Chief Justice) were abolished, so that appeals could now be made direct from the Supreme Courts to the English Privy Council. Circuit Courts were provided where needed. The English law was still recognised in the administration of justice in the colonial courts, as far as it could be applied in the colonies.

\* Lang, Vol. I., p. 266; 10 Geo. IV., N.S.W., 9th Oct., 1829.

† 3 Vic., No. 11, 20th Sept., 1839.

## APPENDIX TO CHAPTER I.

### THE NEW SOUTH WALES JUDICATURE ACT OF 1823.

4 Geo. IV. cap. 96. July, 1823. (Clauses selected and condensed).

### MILITARY OR NAVAL JURORS IN CRIMINAL CASES.

IV. All crimes, misdemeanours and offences respectively . . . shall be tried by the judges of the said courts and a jury of seven commissioned officers of His Majesty's sea or land forces . . . and such jurors shall be nominated by the Governor or Acting-Governor of New South Wales or Van Diemen's Land respectively; and the said officers shall severally be liable to challenge or objected to upon the special ground of direct interest or affection to be specified in open court at the time of challenge. . . . Provided . . . if there should not be seven commissioned officers of His Majesty's sea or land forces within the distance of fifty miles from the place of holding such court, or in case of the sickness of any such officers, the person administering the government of Van Diemen's Land shall nominate such magistrates as to him seem meet . . . to act as jurors, and the magistrates shall be liable to be challenged or objected to in the same manner.

### JURORS IN CIVIL CASES.

VI. In any action at law to be brought in the said Supreme Courts . . . the trial of such issue or issues shall be by the Chief Judge of the said courts respectively and by two assessors being magistrates or justices of the peace, and the magistrate shall be

liable to challenge. . . . Provided always that if the parties, plaintiff and defendant in any such action shall be desirous of having any such issue or issues of fact as aforesaid tried by a jury of 12 men . . . then and in any such case such issues shall be tried by a jury under the direction of the said judge. [Clause XII. limits the hearing before a jury to cases under £500. Appeals to Court of Appeals were permissible in cases above £500.]

#### QUALIFICATIONS OF JURORS.

VII. No person shall be deemed competent to serve upon any jury as aforesaid who shall not possess a freehold estate of fifty acres or more of cleared land, or a freehold dwelling house or tenement of the value of three hundred pounds sterling or upwards situate in some part of New South Wales or Van Diemen's Land respectively.

#### PROVISION FOR EXTENSION OF THE SYSTEM.

VIII. It shall be lawful for His Majesty at any time or times hereafter to cause the trial by jury to be further introduced and applied in such parts of New South Wales and Van Diemen's Land as . . . shall seem meet.

#### QUARTER SESSIONS.

XIX. Courts of General or Quarter Sessions shall be held in New South Wales and Van Diemen's Land at such times as the Governor shall appoint and they shall have power and authority to take cognizance of all matters cognizable in Courts of General or Quarter Sessions in England so far as the circumstances and conditions of the said colony shall require and admit . . . and to take cognizance of all crimes and misdemeanours not punishable with death. . . .

#### COURTS OF REQUESTS.

XX. It shall be lawful for the Governor to institute Courts of Civil Jurisdiction to be called "Courts

of Requests" as occasion shall require with full power and authority to hear and determine in a summary way all actions, plaints and suits for the payment or recovery of any debt, damage or matter not exceeding £10.

#### LEGISLATIVE COUNCIL.

XXIV. Whereas it may be necessary to make laws and ordinances for the welfare and good government of the said colony of New South Wales . . . , and whereas it is not at present expedient to call a Legislative Assembly in the said colony; be it therefore enacted that it shall be lawful for His Majesty . . . to constitute and appoint a Council to consist of such persons resident in the said colony not exceeding seven nor less than five as His Majesty will be pleased to appoint . . . and the Governor with the advice of the Council or the major part of them shall have power and authority to make laws and ordinances for the peace, welfare and good government of the said colony, such laws and ordinances not being repugnant to this Act, or to any charter or letters patent or order in council which may be issued in pursuance hereof, or to the laws of England, but consistent with such laws so far as the circumstances of the said colony will admit: Provided always that no law or ordinance shall be passed or made unless the same shall first by the said Governor . . . be laid before the said Council: Provided also that in case all or the major part of the members of the said Council shall dissent from any law or ordinance proposed by the said Governor . . . the members of the said Council so dissenting shall enter upon the minutes the grounds and reasons of such their dissent, and in every such case such proposed law or ordinance shall not pass into a law: Provided nevertheless that, if it shall appear to the Governor that such proposed law or ordinance is essential to the peace and safety thereof and cannot without extreme injury to the welfare and good government of the said colony be rejected, then, and

in every such case, if any one or more member or members of the said Council shall assent to such proposed law, the said Governor shall enter upon the minutes of the Council the grounds and reasons of such his opinion; and in every such case, and until the pleasure of His Majesty shall be made known in the said colony respecting the same, such law or ordinance shall be of full force and effect in the said colony and the dependencies thereof, any such dissent as aforesaid of the majority of the members of the said Council notwithstanding.

#### GOVERNOR ABSOLUTE IN CASE OF REBELLION.

XXV. In case any rebellion or insurrection shall have actually broken out, or . . . if there shall be good and sufficient cause to apprehend that any such rebellion or insurrection is about forthwith to break out . . . it shall be lawful for the Governor to enforce any law or ordinance necessary for suppressing or preventing any such rebellion or insurrection, although every member of the said Council shall dissent from any such law or ordinance.

#### TAXATION FOR LOCAL PURPOSES.

XXVII. The Governor shall not impose any tax or duty upon any ship or vessel trading with the colony, or upon any goods, wares and merchandise imported into or exported from the same, nor any other tax or duty except such as may be necessary to levy for local purposes.

#### CHIEF JUSTICE TO DECLARE ON THE VALIDITY OF PROPOSED MEASURES.

XXIX. No law or ordinance shall be laid before the Council or be passed into law unless a copy thereof shall have been first laid before the Chief Justice of the Supreme Court of New South Wales and unless such Chief Justice shall have transmitted to the said Governor a certificate that such proposed

law is not repugnant to the laws of England, but is consistent with such laws as far as the circumstances of the colony will admit.

#### PROVISION FOR SEPARATION OF VAN DIEMEN'S LAND.

XLIV. In case it shall at any time seem fit to His Majesty to constitute and erect the Island of Van Diemen's Land and any islands, territories, or places thereto adjacent into a separate colony independent of the Government of New South Wales, it shall be lawful for His Majesty so to do, and to commit to any person or persons within the said Island of Van Diemen's Land such and the like powers, authorities, and jurisdictions as by virtue of this present Act or of any other Act of Parliament are or may be lawfully committed to any person or persons within the colony of New South Wales and its dependencies, subject to such restrictions, provisoies and declarations as are hereinbefore made and contained, and thereupon the appeal hereinbefore granted to the Governor of New South Wales and its dependencies from the judgments, decrees, orders and sentences of the Supreme Court of Van Diemen's Land shall cease and determine.

XLV. This Act shall continue in force until 1st day of July, 1827, and from thence until the end of the next session of Parliament.

[NOTE.—An Act passed in July, 1827 continued the operation of the Act of 1823 until 31st Dec. 1829.]

#### THE ACT OF 1828.

9 Geo. IV. cap. 83. 25th July, 1828.

#### MILITARY JURY AND CHALLENGE.

V. All crimes, misdemeanours and offences . . . shall be tried by one or more of the judges and seven commissioned officers of His Majesty's sea and land forces . . . nominated for the purpose by the

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Governor, and the officers shall severally be liable to be challenged or objected to.

### CIVIL JURY AT COURTS' DISCRETION.

VIII. In any actions at law to be brought in the Supreme Court, the trial shall be by one or more judges and two assessors being magistrates and justices of the peace, nominated for the purpose by the Governor and shall be liable to challenge: Provided always that if either of the parties, plaintiff or defendant, shall be desirous of having the said issue tried by a jury and shall apply for that purpose to the said Supreme Courts respectively, it shall be lawful for the courts to award or refuse a trial by jury as the justice of each particular case may seem to such courts to require (cf. VI. of 1823 Act.)

### EXTENSION OF JURY SYSTEM.

X. It shall be lawful for His Majesty by any order by him issued with the advice of his Privy Council at any time or times hereafter to authorise the Governor of New South Wales and Van Diemen's Land respectively or either of them with the advice of the Legislative Councils of the said colonies respectively or either of them further to extend and apply the form and manner of proceeding by grand and petit juries, or either of them in the presentment and trials of all crimes, misdemeanours, issues, matters and things properly cognizable by juries in such parts of the colonies and their dependencies at such times and with, under, and subject to such limitations, modifications, and rules in respect thereof as to the Governor and Councils shall seem meet and as shall from time to time be specified in any law or ordinance to be by them made in such behalf.

### CIRCUIT COURTS.

XIII. It shall be lawful for His Majesty to institute Circuit Courts at such times and in such districts or counties as shall from time to time be deemed necessary.

## APPEAL.

XV. It shall be lawful for His Majesty to allow any person feeling aggrieved by any judge of the Supreme Court to appeal therefrom to His Majesty in Council.

## LEGISLATIVE COUNCIL.

XX. Whereas it is not at present expedient to call a Legislative Assembly in either of the colonies . . . it shall be lawful for His Majesty to constitute and appoint in New South Wales and Van Diemen's Land respectively a Council to consist of such persons resident in the said colonies respectively not exceeding fifteen nor less than ten . . . as His Majesty shall be pleased to nominate.

## POWERS OF THE COUNCILS.

XXI. Neither of the Councils shall be competent to act unless two-thirds at the least of the whole number of members on the list of such Council, exclusive of the Governor or Presiding member shall be actually present, and the votes, acts, and resolutions of the major part of the members so present shall be deemed and taken to be the votes, acts, and resolutions of the whole of such Council . . . and the Governors, with the advice of the Legislative Councils, shall have power and authority to make laws and ordinances for the peace, welfare and good government of the Colonies . . . provided that in case all or major part of the members of either of the Councils present shall dissent from any law or ordinance, the members so dissenting shall enter upon the minutes the grounds and reasons of such their dissent, and in every such case such proposed law or ordinance shall not pass into a law, and that in any case where either of the Governors shall refuse to lay any proposal of any law or ordinance before his Council, he shall, on the request of any member of such Council lay before the Council a copy of his refusals and the grounds of his refusal . . . and every member who may dis-

approve such refusal shall be at liberty to enter upon the minutes the grounds of such disapprobation. (cf. 4 Geo. IV. cap. 96 s. XXIV.)

#### AMENDED RELATION OF SUPREME COURT JUDGE TO LEGISLATION.

XXII. Every law or ordinance made shall within seven days be transmitted to the Supreme Court to be there enrolled and recorded, and every such law or ordinance shall take effect and be binding until His Majesty's pleasure shall be known; but if before the expiration of fourteen days the Judges of the Supreme Courts transmit to the Governor a representation that any such law or ordinance is repugnant to this Act . . . or to the laws of England, the Governor shall suspend the operation of the law until the same hath been brought under the review of the Legislative Council: and if upon review the Governor in Council shall adhere to such ordinance, it shall take effect until His Majesty's pleasure shall be known, any repugnancy or supposed repugnancy of such law or ordinance to the Act or the laws of England notwithstanding; and the Judges shall be required in any such representation as aforesaid to state fully the grounds of their opinions which representation shall be forthwith transmitted by such Governor to His Majesty.

#### GOVERNOR TO PRESIDE AT COUNCIL.

XXIII. The Governor shall preside at all meetings of the Legislative Council.

## CHAPTER II.

### CONSTITUTIONAL DEVELOPMENT IN NEW SOUTH WALES—(Continued).

1842-1850.

#### REPRESENTATIVE GOVERNMENT, 1842.

The Act of 1828 remained in operation for The Third Stage \* fourteen years, when the third stage in the Constitutional development of the colony was reached with the passing of an Imperial Act \* establishing a partially representative system. Transportation of convicts had ceased, after considerable agitation on the part of Wentworth and the Patriotic Association; and it was now felt that another endowment of political power might well be bestowed on the colonists. The Bill passed the Imperial Parliament in 1842 without a single dissentient vote, though this unanimity betokened indifference rather than whole-hearted approval of its clauses.

According to the new Act the legislature was not to be entirely purged of its nominee element; yet it would consist mainly of popularly elected representatives. The newly

A partially representative Council.

\* 5 and 6 Vic. cap. 76.

constituted Council was to consist of thirty-six members; twenty-four were to be chosen by the enfranchised section of the people, the other twelve to be nominated as hitherto. This dual system of membership was probably regarded as a more or less satisfactory substitute for a bicameral or double-chambered Parliament. Of the twenty-four representatives, five were to be elected as representatives of the district of Port Phillip generally, and one in particular for the town of Melbourne. Of the twelve nominees, not more than one-half were to be of the official class; the Governor had therefore to nominate at least six civilians. The franchise was limited to owners of freehold worth £200 and householders paying £20 rent per year (lowered in 1850 to £10). The qualification for an elective seat on the Council was the possession of freehold worth £2,000 or returning an annual income of £100. The Council was empowered within certain limits to modify its own constitution. It could, for instance, effect a change in its own numerical strength; but it was especially provided that the ratio of two to one existing between elected and nominated members should be left undisturbed.

**Increased Powers of the Council.** The powers of the re-constituted Council were considerably increased, and for this reason, and because two-thirds of its members

Distribution and Qualification of Members.

obtained their seats independently of the Governor, it was less under the influence of that official. He ceased, for example, to preside over the Council,\* for it now had the right to elect its own Speaker. Naturally, therefore, it secured also the right to initiate legislation, though the Governor might still require the discussion of any proposals. It was also incumbent upon the Government to call the legislature together for at least one session every year, and the maximum life of a Council was fixed at five years, subject to earlier dissolution by the Governor. The nominees held their seats, not for life, but for the term of the particular legislature to which they had been nominated.

The new body was granted the power to make laws for the peace, welfare and good government of the colony, though all laws repugnant to British law were invalid. This legislative right included the power to impose customs duties, though no country was to be more favourably treated than any other. Its control over colonial revenues was extended, but was by no means complete. In the first place, it was laid down that the colony must provide a civil list of £80,000 for the remuneration of the Governor and other officials; secondly, the Colonial Office in

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\* Contrast Clause XXIII. of the Act of 1828.

England would not surrender its control of the sale of Crown lands or of the revenue therefrom; and thirdly, the Governor introduced measures concerning public expenditure.

A prominent feature of the Act of 1842 is its silence on judicial matters. It is concerned only with the administrative and legislative machinery of the colony. The earlier Acts of 1823 and 1828 had provided for all three departments. The explanation is, of course, that the administration of justice had become a matter for the local Council to control, and consequently the necessity for Imperial provision had disappeared.

**A Local Government Scheme—Its unpopularity.**

Another interesting feature of the same Act is the attempt to establish some form of local government. By virtue of some of the clauses the Governor was empowered to establish District Councils, nominated by himself in the first instance, and elected on subsequent occasions. The number of Councillors varied from eight to twenty-one according to the population of the districts.

Although it was very desirable that some system of local government should develop sooner or later, it was unfortunate that the Home Government attempted to force a system prematurely on the colony. The effect was to provoke opposition on the part of the colonists. The rural districts were reluctant to form councils, and eventually the attempt lament-

ably failed. It is thought by some that the adoption of local government schemes were retarded as a consequence, and the population taught to depend too greatly on its central government. The break-down of the scheme was due largely to some objectionable clauses as to the duties to be thrust upon the local councils. In addition to requiring them to attend to such matters as the construction of bridges, roads, and public buildings, education, rates, tolls, and control of all public property within their spheres of operation, they were also rendered liable for one-half of the expenses incurred in the maintenance of the police force, though no control whatever over the police was allowed them. The Governor could issue warrants requiring district treasurers to pay the sum assessed for this purpose, and failing payment, he could order the sale of the treasurer's private goods and even those of the councillors or inhabitants. Little wonder that the colonists developed an antagonism to such arbitrary arrangements, especially when they were imposed on them by external authority, and not by their own legislature.

The first Council under the revised Constitution met on the 1st August, 1843. Amongst the elected members were William Charles Wentworth and William Bland, representing Sydney, and Dr. Lang, Dr. (afterwards Sir

Prominent Members of the Council

Charles) Nicholson and Thomas Walker for the Port Phillip district; whilst Charles Cowper, Richard Windeyer, Major d'Arcy Wentworth and G. R. Nichols figured as country members. The Colonial Secretary, Deas Thomson, was amongst the official nominees. The leading spirit among these legislators was Wentworth, who, having been largely instrumental in securing for his colony trial by jury, cessation of convict transportation, a free press and a representative system, was now bent on placing on the parliamentary system the coping stone of Responsible Government. The interest of the next decade consists, therefore, in watching this steady march towards the attainment of self-government.

The Council's  
Powers still re-  
stricted.

The Council in 1842 was still unable to control the administration. Representative, but not Responsible, Government had been established. The Governor was still his own Prime Minister, and the heads of departments retained office during his pleasure. Salaried officers, including these heads, were debarred from accepting elective seats in the Council, and one-half of the nominees were non-officials. The severance of the executive and legislative bodies was thus ensured, and the former's independence of the latter safe-guarded. As virtual Prime Minister, the Governor had, in Wentworth's opinion, far too much power. He

still retained the right (1) to dispose of the Crown lands and the proceeds therefrom, (2) to introduce financial measures into the Legislative Council, (3) to exercise independent control over finance in that he could, and did, order the District Councils to increase squatters' rents and (4) to annul or veto bills that had been accepted by the Council. This last-mentioned power he would feel less compunction in exercising than would a constitutional ruler of the present day. He could also influence the deliberations of the Council through his twelve nominees. And, though the local legislature might agree upon certain customs rates, they could not be imposed until the Home Government had approved of them. Even when imposed, these duties were collected by officers responsible to the Home Office. Naturally the Council was but little satisfied with its partial control of the public purse, and with British interference in the colony's foreign trade.

Equally distasteful was Earl Grey's well-intentioned but tactless attempt in 1847 to impose a revised constitution on the colony without the slightest reference to the inhabitants themselves. He proposed to institute the bicameral system of a nominated Upper House and a lower Chamber to be elected by the members of Municipal Councils, who in their turn would be popularly chosen. Public

resentment ran high, and it was but adding fuel to the fire when the British Government attempted in 1848 to revive the practice of transporting convicts to the colonies.

Dissatisfaction at  
Port Phillip.

It was just at this time that the people of the Port Phillip district were agitating for political separation from New South Wales. Although, as already noticed, they were entitled to send six representatives to the New South Wales Legislative Council, yet distance from Sydney and the consequent expense and loss of time in attending the Council meetings discouraged the inhabitants of the district from offering their services as Councillors. The electors were consequently compelled to choose Sydney residents. This naturally created profound dissatisfaction with the Constitution, and developed a spirit of rivalry and antagonism between the two centres which affected their relations with one another for long afterwards.

Recommendations  
of the Committee  
on Trade and  
Plantations.

The outcome of these two agitations was an enquiry by a specially reconstituted Committee of the Privy Council on Trade and Plantations.\*

The Committee recommended—

- (I.) The political separation of New South Wales and Port Phillip.
- (II.) The establishment in each of the three other colonies (Victoria, Tasmania,

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\* *Vide Report of the Committee printed in Egerton's "Federations and Unions in the British Empire."*

and South Australia) of a single House of Legislature similar in composition to that already in existence in New South Wales—one-third of its members to be nominees and the remaining two-thirds elected representatives.

- (III.) The entrusting of these Legislatures with the power of converting their single House system into the bicameral system.
- (IV.) The further empowering of the Legislatures to make "any other amendments to their own Constitution which time and experience may show to be requisite."
- (V.) The reservation of all amendments for royal approval.
- (VI.) Free scope for the influence of public opinion.
- (VII.) Increased control for these Legislatures over public expenditure.

Recommendations of a federal character were also offered, but these will be more fully discussed at a later stage.\*

In accordance with the report of this committee, the Imperial Parliament passed an Act in 1850 for the better government of the Australian Colonies. The Act was proclaimed in January, 1851.† It provided that the Port

\* *Vide Chapter VI.*

† 13 and 14 Vic., ch. 59, Aug., 1850.

Establishment of  
the Colony of Victoria.

Phillip district, with the Murray River as its northern boundary,\* should constitute a separate colony under the name of Victoria. The separation took effect with the issue of the writs for the election of the Victorian Legislative Council on the 1st July, 1851.

**Details of the Act of 1850.** Compensation to New South Wales for the loss of the Port Phillip district was forthcoming in the shape of further political privileges. The powers of the Legislative Council were extended, and the franchise was substantially liberalised. As regards the first of these privileges—the increase of legislative powers—customs duties could now be levied without awaiting the Queen's assent, though this freedom was limited by three conditions:—(1) the stores for English troops in the colonies were to be exempt from taxation; (2) the treaty obligations of Great Britain could not be contravened; and (3) differential duties could not be allowed,—in other words, imports from all other countries were to be taxed equally, no preference being shown even to British goods or to those from neighbouring colonies. There could be no “most favoured nation” policy. The actual collection of the

\* It is well to observe here that when the measure of 1855, effecting still further constitutional changes in the Colonies, was being passed by the Imperial Parliament, a clause was inserted fixing more definitely the boundary. It declared that “the whole water-course of the river Murray from its source to the eastern boundary of South Australia shall be deemed to be within the territory of New South Wales.”

customs still remained the function of officers responsible to the Home Government, until Earl Grey made arrangements in 1851 for the complete transference of all machinery for collection to the Colonial Parliament. On the second point—the liberalising of the franchise—the qualification for electors was reduced in the case of property owners to the possession of property to the extent of £100, and in the case of householders to the renting of houses worth at least £10 per annum. Holders of leases with three years to run and worth £10 a year, and holders of pasture licenses, were also enfranchised. No alteration was made in the qualification for members, and the ratio between nominees and elected representatives was also undisturbed. Consequently, when in 1851 the Council increased its numerical strength from 36 to 54, not more than 36 of these were elected members. But the Council itself was empowered to control in future the qualification of both members and voters, and to amend the Constitution of the legislature so as to provide themselves with two Houses if it was considered desirable. The colonists, in other words, were at liberty to establish, through their representatives, the bicameral system whether nominee or elective, though any such bill would have to receive royal approval before being valid. The colonists had thus an assurance that they would receive

a Constitution of such a character as they themselves desired.

**A Federal experiment.** In accordance with the federal suggestions of the Committee on Trade and Plantations, Governor Fitzroy of New South Wales received commissions as Captain-General and Governor-General of all the Australian possessions, besides further commissions as Governor of each of the colonies—New South Wales, Van Diemen's Land, Victoria and South Australia. The chief official in each State, though in effect the Governor, was nominally only Lieutenant-Governor. Any communications destined for the Colonial Office in England went through the Governor-General, who also could supersede the Lieutenant-Governor's authority whenever he visited any of the colonies. It was hoped that such an arrangement would prove the preliminary step towards a thorough system of federation, and would reconcile the people of New South Wales to the loss of the Port Phillip district. The other colonies, however, resented the subordination of their Governors, and the Victorian device of giving theirs a greater salary than was received by his nominal superior in New South Wales went far to prove the artificiality of the federal scheme. "Instead of serving as an efficient instrument for bringing about a helpful co-operation of the colonies, as had been intended, it (the

federal device) had become a bone of contention and an occasion of discord between the two rival provinces."\* Consequently, in 1855 all the Lieutenant-Governors received the full gubernatorial title and prestige, and six years later the empty title of Governor-General was relinquished.

\* Allin, "The Early Federation Movement of Australia," p. 245

## APPENDIX TO CHAPTER II.

### THE ACT OF 1842 FOR THE GOVERNMENT OF NEW SOUTH WALES AND VAN DIEMEN'S LAND.

5 and 6 Vic. cap. 76. July, 1842. (Selected and condensed clauses).

#### THE LEGISLATIVE COUNCIL.

I. There shall be within the colony of New South Wales a Legislative Council, and it shall consist of thirty-six members, and twelve of the members shall from time to time be appointed by Her Majesty, and twenty-four of the members shall from time to time be elected by the inhabitants of the colony.

#### ELECTORAL PROVISION.

II. The Legislature now established within the colony of New South Wales shall make all the necessary provisions for dividing the colony into electoral districts and for declaring the number of members to be elected for each district . . . provided that the district of Port Phillip shall return at least five members, the town of Sydney shall return two members, and the town of Melbourne shall return at least one member.

#### PROVISION FOR INCREASED MEMBERSHIP.

IV. It shall be lawful for the Governor and Legislative Council to alter the divisions, to establish new divisions, and to increase the whole number of the Legislative Council. Provided always that such

number of the additional Councillors as is equal to one-third part of the whole increase, or if such increase shall not be exactly divisible by three, such whole number as is next greater than one-third shall be appointed by Her Majesty, and the remaining additional members shall be elected by the inhabitants of the colony.

#### QUALIFICATIONS OF ELECTORS.

V. The elective members shall be chosen by the votes of the electors, each of whom shall be either in his own right seised of or entitled to an estate of freehold in possession in lands or tenements situate within the district for which such vote is to be given, of the clear value of £200 at the least, above all charges and incumbrances, or a householder occupying a dwelling house of declared annual value of £20.

#### DISQUALIFICATIONS.

VI. No person shall be entitled to vote at any such election unless he be of the full age of twenty-one years, a natural born subject of the Queen or naturalized, or shall hold letters of denization according to the law, and no person entitled to vote who shall have been attainted or convicted of treason, felony or infamous offence unless he shall have received a full pardon or one conditional on not leaving the colony, or shall have undergone the sentence or punishment.

#### QUALIFICATIONS OF MEMBERS.

VIII. No person shall be capable of being elected a member of the Legislative Council who shall not be of the full age of twenty-one years, a natural born subject or naturalized, who shall not be legally seised of an estate of freehold in lands and tenements in New South Wales of the yearly value of £100 or of the value of £2,000.

**ONE-HALF OF NOMINEES TO BE NON-OFFICIAL.**

XII. It shall be lawful for Her Majesty to nominate the non-elective members, provided that not more than one-half of the number of such non-elective members shall hold any office of emolument under the Crown within the colony.

**DURATION OF APPOINTMENT.**

XIV. Every non-elective member of the Legislative Council shall hold his seat for five years from the date of his appointment or until the Council shall be sooner dissolved.

**ANNUAL SESSIONS.**

XXI. There shall be a session of the Council once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the Council in one session and the first sitting of the Council in the next session, and that every Council shall continue for five years from the day of the return of the writs.

**ELECTION OF A SPEAKER.**

XXIII. The Legislative Council shall at its first meeting, and before proceeding to the dispatch of any other business, elect some one member of the Council to be Speaker thereof.

**GOVERNOR EMPOWERED TO INTRODUCE MEASURES.**

XXX. It shall be lawful for the Governor to transmit to the Council for its consideration the draft of any such laws which it may appear to the Governor desirable to introduce, and any amendments which he shall desire to be made in any bill presented to him for Her Majesty's assent, and such proposed laws shall thereupon be considered by the Council in like manner as if the same were bills which had originated therein.

### APPROPRIATION OF REVENUE.

XXXIV. Subject to the provisions hereinafter contained the whole of Her Majesty's revenue within the colony shall be appropriated to the public service within the colony by ordinances enacted by the Governor with the advice and consent of the Legislative Council, and in no other manner, provided that it shall not be lawful for the Council to pass or the Governor to assent to any Bill appropriating to the public service any sum unless the Governor shall first have recommended to the Council, and make provision for the specific public service towards which such money is to be appropriated.

### DISTRICT COUNCILS.

XLI. It shall be lawful for the Governor to incorporate the inhabitants of every county within the colony or such divisions as to him seem fit to form districts and to establish a Council in every such district for the local government thereof. Every such district Council shall be elective after the first nomination thereof. If the population in such districts be less than 7,000 souls the number of Councillors shall not be more than 8; if the population be 7,000 and less than 10,000, the number of Councillors shall not be more than 12; 10,000 and less than 20,000, 15; 20,000 and upwards, 21. No district Councillor shall continue in office for more than three years unless re-elected.

### POWERS OF DISTRICT COUNCILS.

XLII. It shall be lawful for the Councils in the districts to make orders and bye-laws for all or any of the following purposes:—Roads, streets, bridges, public buildings, providing means for defraying such expenses of or connected with the administration of justice and police within the district as are by law directed to be defrayed by the district or out of the district funds, establishment and support of schools, tolls, rates and penalties.

ONE-HALF OF THE COST OF MAINTENANCE  
OF POLICE TO BE BORNE BY DISTRICT  
COUNCIL.

XLVII. One-half of the expense of the police establishment shall be defrayed out of the general revenue within the colony, and the other half shall be defrayed by assessment upon the several districts of the colony in such proportions as shall be fixed by the Governor and the Legislative Council. It shall be lawful for the Governor to issue warrants directed to the Treasurer of the several district Councils requiring them within two calendar months to pay the sum assessed.

DISTRICT TREASURER'S RESPONSIBILITY.

XLVIII. The Treasurer of each district Council to whom any such warrant shall come shall pay the amount mentioned in the warrant out of any monies in his hands belonging to the district, or if there be no monies or an insufficient sum in his hands, the district Council shall assess and levy the amount by fair and equal rate upon all property within the district.

PROVISION FOR OBTAINING ARREARS OF  
SUCH REVENUE.

XLIX. If the amount ordered by such warrant to be paid by the Treasurer of any district shall not be paid within two calendar months after the receipt of the warrant to such persons as the Governor shall appoint to receive the same, it shall be lawful for the public Treasurer of the said colony, or other proper person appointed to issue his warrant for levying the amount or so much thereof as shall be in arrear with all costs and charges of such proceeding by distress and sale of the goods of the said Treasurer of the district and of all or any of the members of the said district Council, and if no sufficient distress can be thereby made, then by distress and sale of the goods of any of the inhabitants of the said district.

PROVISION FOR ESTABLISHMENT OF  
NEW COLONIES.

LI. It shall be lawful for Her Majesty to define as to Her Majesty shall seem meet the limits of the colony of New South Wales and to erect into a separate colony or colonies any territories which now are or hereafter may be comprised within the colony of New South Wales: Provided always that no part of the territories lying southward of the 26th degree south latitude in New South Wales be detached from the colony.

THE ACT OF 1850 FOR THE BETTER GOVERNMENT OF HER MAJESTY'S AUSTRALIAN COLONIES.

13 and 14 Vic. cap. 59. Aug. 1850.

ESTABLISHMENT OF VICTORIA.

I. . . Whereas it is expedient that the district of Port Phillip now part of the colony of New South Wales should be erected into a separate colony and that further provision should be made for the government of Her Majesty's Australian colonies, be it enacted . . . that upon the issuing of the writs for the first selection the territories now comprised within the district of Port Phillip, including the town of Melbourne, and bounded on north and north-east by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the eastern boundary of the colony of South Australia, shall be separated from the colony of New South Wales, and shall cease to return members to the Legislative Council of such colony, and shall be erected into and thenceforth form a separate colony to be known and designated as the colony of Victoria.

ELECTORAL PROVISION.

III. It shall be lawful for the Governor and Legislative Council (i.e., of New South Wales) to deter-

mine the number of members of which the Legislative Council of New South Wales . . . and of which the Legislative Council of Victoria shall consist, and for dividing the territories to be comprised in the colony of Victoria into convenient electoral districts.

IV. Every man of the age of twenty-one years, being a natural born or naturalised subject of Her Majesty, and having a freehold estate within the district for which his vote is to be given of the clear value of £100 . . . or being an householder within such district, occupying a dwelling house of the clear annual value of £10, and having resided therein six calendar months, or holding a license to depasture lands, or having a leasehold of the value of £10 sterling per annum upon a lease, which, at the date of such writ has not less than three years to run shall be entitled to vote at the election of a member of the Legislative Council, provided that no man shall be entitled to vote who has been attainted or convicted of treason, felony, or other infamous offence unless he had received pardon, or one conditional on not leaving the colony, or have undergone the sentence passed on him for such offence.

#### LEGISLATIVE COUNCILS IN VAN DIEMEN'S LAND, SOUTH AUSTRALIA AND WESTERN AUSTRALIA.

VII. It shall be lawful for the Legislature now by law established within Van Diemen's Land and South Australia to establish a Legislative Council to consist of such number of members not exceeding twenty-four as they shall think fit, and that one-third of the whole number of members shall be appointed by Her Majesty, and the remaining members shall be elected by the inhabitants.

IX. Upon presentation of a petition signed by not less than one-third of the householders within the colony of West Australia, it shall be lawful to establish a Legislative Council within the colony (one-

third appointed by Her Majesty and two-thirds elected).

#### DISTRICT COUNCILS ON PETITION.

XX. Charters establishing district Councils shall be revoked on petition and the Governors of New South Wales and Victoria are not to grant charters except on petition.

#### POLICE EXPENSES.

[Clause XXIII. repeals provisions requiring one-half of the expense of police establishments to be borne by the district.]

#### IMPOSITION OF CUSTOMS DUTIES.

XXVII. It shall be lawful for the Governor and Legislative Council to impose and levy such duties of customs as may seem fit on the importation into the colonies of any goods, wares, merchandise whatsoever, whether the produce or manufacture of, or imported from, the United Kingdom or any of the colonies or dependencies of the United Kingdom or any foreign country. Provided always that no new duty shall be so imposed upon the importation into any of the said colonies of any article the produce or manufacture of, or imported from any particular country or place which shall not be equally imposed on the importation into the same colony of the like article the produce or manufacture of or imported from all other countries and places whatsoever.

#### ADMINISTRATION OF JUSTICE.

XXIX. It shall be lawful for the Governor and Councils of the colonies in New South Wales, Van Diemen's Land, and Victoria, to make such provision as to them may seem meet for the better administration of justice, and for defining the Constitution of the courts of law and equity, and of juries within the said colonies.

RESTRICTION OF RIGHT TO LEVY DUTIES  
OR GRANT BOUNTIES.

XXXI. It shall not be lawful for the Governor and Legislative Councils of the colonies to levy any duty upon articles imported for the supply of Her Majesty's land or sea forces, nor to levy duty, impose any prohibition or restriction or grant any exemption, bounty, drawback, or other privilege upon the importation or exportation of any articles nor to impose any duties or charges upon shipping contrary to or at variance with any treaty or treaties concluded by Her Majesty with any foreign power.

PROVISION FOR ELECTORAL ALTERATIONS  
AND ESTABLISHMENT OF BICAMERAL  
LEGISLATURES.

XXXII. It shall be lawful for the Governor and the Legislative Council of the colonies from time to time by any Act or Acts to alter the provisions or laws concerning the election of the elective members of such Legislative Councils respectively, the qualifications of electors, and elective members, or to establish instead of the Legislative Council a Council and a House of Representatives or other separate Legislative Houses to consist respectively of such members to be appointed or elected by such persons and in such manner as by such Act or Acts shall be determined, and to vest in such Council and House of Representatives or other separate Legislative Houses the powers and functions of the Legislative Council for which the same may be substituted. Provided always that every Bill which shall be passed by the Council in any of the said colonies for any of such purposes shall be reserved for the signification of Her Majesty's pleasure thereon, and a copy of such Bill shall be laid before both Houses of Parliament for the space of thirty days at the least before Her Majesty's pleasure thereon shall be signified.

## PROVISION FOR A COLONY WITH A LEGISLATIVE COUNCIL TO THE NORTH OF N.S.W.

XXXIV. It shall be lawful for Her Majesty upon the petition of the inhabitant householders of any of the territories northward of 30 degrees of south latitude to detach such territories from the colony of New South Wales and to erect such territories into a separate colony or colonies;

XXXV. It shall be lawful to establish a Legislative Council within such colony (i.e., newly erected colonies). One-third part of the whole members shall be appointed by Her Majesty, and the remaining members shall be elected by the inhabitants.

## CHAPTER III.

### CONSTITUTIONAL DEVELOPMENT IN NEW SOUTH WALES—(Continued).

Since 1850.

#### RESPONSIBLE GOVERNMENT.

Despite the concessions (referred to in the previous chapter) made by the British Parliament in 1850, most of the clauses of the 1842 Constitution to which exception had been taken remained still in force. Wentworth was bent on securing their removal. He therefore prevailed upon the Council in 1851 to pass the "Declaration and Remonstrance" against the new Constitutional arrangements on the following grounds:—

(1) The Council was still debarred from the full control of all revenue and taxation. Proposals for expenditure came still directly from the Governor, and the land proceeds were still beyond the Council's control.

(2) The British Government was wont to interfere, by instructions to the Governor, with appointments to colonial positions, and

(3) The Legislature had neither full legislative powers, nor any effective control over the

Wentworth's  
"Declaration and  
Remonstrance."

administration. The right to criticise without the power to remove officials did not satisfy them.

The Council in its Remonstrance declared: "We owe it to ourselves and our constituents to denounce to your Majesty, as the chief grievance to which the people of this colony are subjected, the systematic and mischievous interference which is exercised by the Colonial Minister even in matters of purely local government." Whilst professing to be "most anxious to strengthen and perpetuate the connection happily subsisting with the fatherland," the Council proceeded to declare that it would "be impossible to maintain much longer the authority of a local executive compelled to refer all measures of importance . . . for the decision of an inexperienced, remote, and irresponsible department."\* The demand for responsible government was becoming more incessant, and the Council resolved that it was "prepared upon the surrender to the Colonial Legislature of the entire management of all our revenues, territorial as well as general, and upon the establishment of a Constitution similar in outline to that of Canada, to assume and provide for the whole cost of our internal government whether civil or military."† The despatch

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\* Rusden, "History of Australia," II., 499.

† Quick and Garran, "Annotated Constitution," p. 41.

Pakington's Response. drawn up by Sir John Pakington, the new Secretary for the Colonies, was the British Government's response to the "Remonstrance." The Minister declared his willingness to extend further Constitutional liberties to the colonies. He was convinced the time was opportune, as on account of the gold discoveries there had been an accession to the population of Australia. Moreover, Australian statesmen had, in his opinion, given satisfactory evidence of their ability to control the destinies of a State. Pakington suggested that each colony should draft and submit for approval a revised Constitution. He stated that the British Government was prepared to surrender its control of Crown lands to the Colonial Councils as soon as the changes were effected. He concluded by expressing in prophetic language the hope that the contemplated changes "will not only tend to promote the welfare and prosperity of the great colony . . . but also to cement and perpetuate the ties of kindred affection and mutual confidence which connect its people with that of the United Kingdom."

The Draft Constitution. A select committee with Wentworth at its head, and Deas Thomson, Cowper, Martin and James Macarthur amongst its members, proceeded without delay to draft a Constitution for New South Wales. The changes they suggested went further than the provision in

the Act of 1850 allowed for. A bicameral Parliament was agreed upon. Wentworth's original suggestion with respect to the Legislative Council was that it should consist either of members with hereditary claims of membership so as to give "incentive to a laudable ambition," or of members elected like the Scottish representatives in the House of Lords by an hereditary nobility such as Wentworth desired to see created. Such a suggestion was too severe a strain on the democratic temper of the colony. Indignation meetings were the order of the day. Vigorous protests were forthcoming from all directions. Amongst the prominent opponents of the Wentworthian scheme was one destined in later years to figure still more largely in the public life of the colony—Mr. (afterwards Sir) Henry Parkes. The opposition convinced Wentworth of the unpopularity of his scheme for the founding of an hereditary nobility. He consequently contented himself with the milder, and from a democratic standpoint, less objectionable, nominee chamber.

The Council was to consist of not less than twenty-one members nominated by the Governor with the advice of the Executive Council. At least four-fifths of its members were to be from the non-official class. The nominations were in the first instance for five years only; at the expiration of the first quin-

quennial period, all nominees were to be appointed for life. A property qualification was not demanded.

(ii.) **The Legislative Assembly.** The Legislative Assembly was to consist of 54 members (raised to 72 in 1858) chosen by the electors. Electors had to be residents of six months' standing who owned freehold of the value of £100, occupied a building, lodging or land for which they paid an annual rent of £10, held a pasture license, or paid £40 per year for board and lodging. An elector was allowed a vote in every constituency in which he had the necessary qualification. No additional qualification was insisted on for membership, but no official under the Crown and no minister of religion could be elected to the Assembly.

(iii.) **Powers of the Legislature.** Increased powers were to be given to the Legislature. All revenues—including returns from Crown lands—which, to the disgust of the colonists, had for so long been controlled by the Imperial Authorities—was to form a Consolidated Revenue Fund. Its appropriation or disposal could be determined by none other than the Colonial Legislature. Bills for appropriation, as well as those for taxation, were to originate in the Lower House after recommendation by the Governor in a message to the House. This procedure ensured that the Governor's advisers, the Ministers, would control the supply and expenditure subject to

the approval of the popular House. Largely increased powers of legislation were also conferred on Parliament. They included the right to frame laws relative to the waste lands of the Crown, and, on certain conditions, to amend its own Constitution. The chief restrictions were, as under the old Act, that (1) No duties could be levied on the Queen's forces; (2) fiscal and commercial laws inconsistent with treaties made by Great Britain would be held invalid; and (3) differential customs duties were forbidden. The last of these means, as already explained, that all countries were to be treated alike in the matter of import and export duties. The independence of judges and the consequent purity of justice was safeguarded in the usual way—by the appointment of judges for life, and their non-removal except by the will of both Houses of Parliament, expressed in an address to the Governor, on the grounds of bad conduct. Parliament was to assemble at least once every year, and its life was limited to five years.

The draft Bill was accepted by the Colonial Legislature. Wentworth and Deas Thomson were commissioned to proceed to England, to explain its provisions and to ensure its passage through the Imperial Parliament. After slight modifications by the British Minister it was presented to Parliament which—after vigorous opposition to some of the clauses on

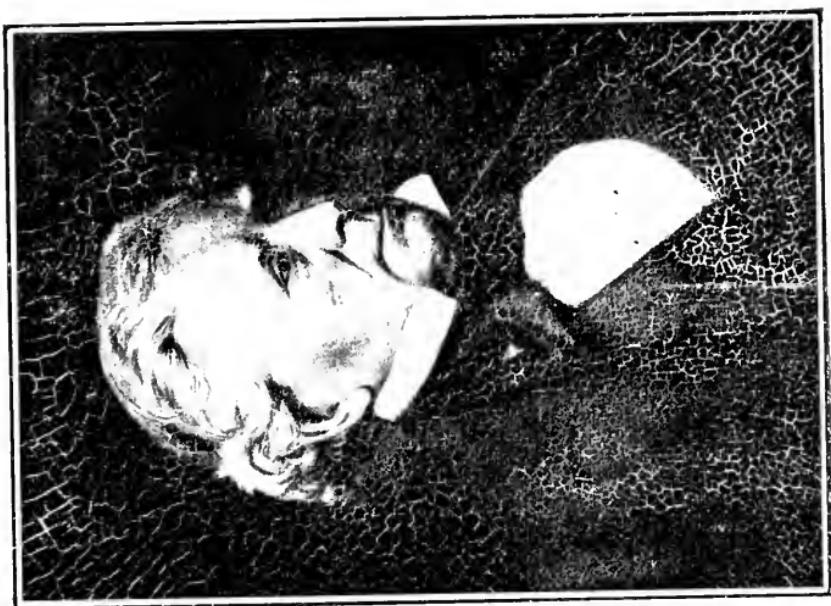
the part of Mr. Robert Lowe, formerly of New South Wales, but then a member of the House of Commons—approved of it and forwarded it for the Royal assent. This was given on the 16th July, 1855, and the Act proclaimed in the colony four months later (November).\*

**The Fourth Stage** The New South Wales Constitution Act —Responsible Government. does not expressly state that Parliament is to control the Executive; neither does it anywhere employ the term “responsible government.” Yet it was distinctly understood that the passing of the Act would involve the establishment of such a system. In future the Executive would be accountable for all its administrative acts to the Legislature, and especially to the House representing the people. Such a responsibility is certain, implied, as it is expressly stated (1) that certain powers are vested in the Governor “with the advice of the Executive Council,” and (2) that the Legislature controls all the consolidated revenue, including the proceeds from Crown lands. It invariably happens that the body which controls the public purse controls the administration. The Executive cannot carry on without supplies, and these are not forthcoming except through the goodwill of the people’s representatives. Any doubt as to the

\* 18 and 19 Vic., c. 54.

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WILLIAM CHARLES WENTWORTH  
*After the original oil painting in the Mitchell Library*



SIR E. DEAS THOMSON



relations of the Executive and Legislature, however, was set at rest by a despatch forwarded by the Secretary for the Colonies to the Governor, advising him of the introduction of the system of responsible government, and thus explicitly stating what the Act merely implied. As a consequence, the Governor's position henceforth carried less political power. Whilst he remained the official head of the Government, all real authority rested with the Ministers, who exercised it as long as they could retain the confidence of the Legislative Assembly. The *personnel* of the Assembly, in its turn, depended on the political opinions of the enfranchised community. Thus the democrats had at last come to realise their greatest aspiration. Popular control over the Legislature directly, and over the Executive through the Legislature, had become an accomplished fact.

The first wholly elected Parliament was opened on the 22nd May, 1856, by Governor Denison. Within a month the first Ministry responsible to Parliament was formed with Stuart Alexander Donaldson as Premier; Thomas Holt, Treasurer, and Sir William Manning, Attorney General.

The Constitution of 1856 is in its general *Constitutional* character the present Constitution of the changes since 1856 State. But important alterations and modifications, in respect of both the composition of

the Houses and the extent of the franchise, have since been made, whilst since 1901 certain functions have been transferred to the care of the Federal Government and Parliament. The most important modifications are the following:—

**Simple Majorities for Constitutional Amendments.** (1) In 1857 it was resolved that simple, instead of two-thirds majorities as agreed upon when drawing up the Constitution, could effect alterations of electoral divisions and the distribution of representatives.

**Electoral Reforms** (2) In the following year (1858) secret voting by means of the ballot-box was introduced, and the franchise was further liberalised, though it was not until 1893 that "manhood suffrage" and the principle of "one man one vote" were adopted. At the present day it is illegal for an elector to vote for a candidate for any electorate other than the one in which he resides. Residence, not possession of property, is the determining factor in the matter of the franchise. Since 1902 women have been allowed to vote, though it was at the same time emphatically laid down that no woman could be nominated as a candidate or be elected as a member of Parliament.\* Thus "Universal" or "Adult" Suffrage is now in full operation. Every adult resident, man or woman, provided he or she is a natural-born

\* Act 54, 1902 (27th Aug.).

or naturalised subject of the Crown, and is not a lunatic or criminal, is entitled to vote; and every man who is not disqualified by reason of lunacy, bankruptcy, crime, business contract with the Government or allegiance to a foreign power, is eligible for Parliamentary membership.

In 1911 the residential qualifications were reduced to the lowest practicable. A new arrival may claim the vote after six months' residence in the Commonwealth, provided he has at the same time lived for the last three months within the State, and at least one month in the electorate. In the previous year a system of "second ballot" was introduced to ensure that no candidate should be returned until he had received the support of an "absolute" majority (*i.e.*, more than one-half) of the voters polling in the electorate. If more than two candidates are nominated for an electorate, and the first ballot does not result in an absolute majority for any one of them, the names of the two most favoured candidates are re-submitted to the electors and a second poll is taken. The contest is in this way reduced to a clear-cut issue between two aspirants, and the system is supposed to avoid the evils of vote-splitting. It seems, however, an unsatisfactory substitute for the more perfect system of "preferential voting," such as is in operation in Tasmania.

#### The Second Ballot

**Numerical strength of the Assembly.** (3) The number of members elected to the Legislative Assembly has varied from time to time. Before the colonies federated, the tendency was for the number to grow larger. Thus it rose from 54 in 1856 to 72 two years later, and to 108 in 1880, with provision for its automatic increase along with that of the population. Consequently, in 1891, 141 members were returned by 74 electorates. Two years later, however, the colony was cut up into 125 single-member electorates; and after the establishment of the Federal Commonwealth, as the State found it could manage with a reduced House, the number was fixed at 90, and stands at that level at the present day.

**Payment of Members.** (4) Payment of members was introduced in 1889, and is considered a democratic necessity, so that no one, not even the poorest, may be prevented from offering his services as a legislator. From 1889 to 1912 the members of the Assembly were remunerated at the rate of £300 per year, but in September, 1912, the remuneration was increased to £500.

**Tariff Freedom.** (5) In 1873 the Imperial Government removed its embargo on differential rates, thus giving the colony unrestricted control over its tariff arrangements. This right it retained (but did not use) until the control of customs was handed over to the Commonwealth Government.

(6) A Triennial Act was passed in 1874, <sup>Triennial Parlia-</sup> limiting the duration of any single Parliament ments. to three years. Before that date a quinquennial system was in operation. This change is still further evidence of the democratic spirit of the people, for under the triennial system our legislators are more frequently answerable to their constituents, and therefore, are less likely to disregard public opinion.

(7) The qualifications for membership of the Council were reduced to a minimum in 1890. Any male of the age of 21 years or more, provided he is a natural-born or naturalised subject, and is not debarred by certain disqualifications such as lunacy, etc., is eligible for appointment. <sup>Qualifications of Councillors.</sup>

#### THE PRESENT CONSTITUTION SUMMARISED.

It would be well at this stage to pause and sum up the outstanding characteristics of the State Constitution as it exists to-day. We must observe in the first place that New South Wales has a Legislature more nearly on the British pattern than is the case in any other of the Australian States (Queensland excepted). It has an Upper Nominated House—the Legislative Council—corresponding in a sense to the English House of Lords, the members being <sup>The Legislative Council.</sup>

nominated by the Governor at the instance of his Ministers, and holding their seats for life, though without the power to hand on the privilege to their heirs. Absence from two consecutive sessions without permission deprives a Councillor of his seat, as does also membership in some other Legislature, bankruptcy, crime or allegiance to a foreign power.

The Legislative Assembly. The Legislative Assembly is composed of ninety members, each of whom is elected by a separate constituency or electorate. The Assembly is elected for three years, but is subject to earlier dissolution if circumstances require it. The electorates contain about the same number of voters. The Assembly therefore rests on an extremely democratic basis. The principles of adult franchise, one adult one vote, and one vote one value, dominate the elections. On the day of election a man may record his vote at any time between the hours of eight in the morning and seven in the evening; if he happens to be away from his electorate on the auspicious day, he is entitled to record his vote for that electorate at any polling-booth in the State. Polling day is a public holiday; but any employee who must work can demand time sufficient to attend the polling-booth, and the employer who refuses the demand is subject to a heavy penalty (£50).

It is to be hoped that the extension of such

privileges will result in a decided increase in the general interest in elections. In the past it has been difficult to induce more than sixty-five per cent. of the electors—often considerably less—to exercise this right.

The members of the Legislative Assembly usually belong to one or other political party with a more or less definite programme of proposed legislation. The leader of the strongest party is generally selected by the Governor as his Chief Adviser or Premier. The Premier in his turn selects as his colleagues the most suitable members of his party. It is not necessary that his colleagues should be chosen exclusively from the Assembly. At least one, sometimes more, are members of the Legislative Council. These members are called separately "Ministers of the Crown," and collectively "the Cabinet" or "Ministry."

Since 1856 the following principles of responsible government have been almost invariably recognised:—

Principles of Responsible Government.

(A) The members of the Cabinet must also be members of Parliament. The greater number of them should come from the Legislative Assembly.

(B) The Cabinet must enjoy the confidence of a majority of members of the Assembly. It resigns when either it, its Premier, or often any member of it, ceases to command that confidence. As a rule the Ministry stands or

falls together. This is a recognition of the principle of "Collective Responsibility."

(C) Each member of a Cabinet is placed in charge of a separate Department of State, and is assisted by a permanent and experienced official known generally as the Under-Secretary. It is not unusual, however, for one or more Honorary Ministers (that is, Ministers without a portfolio or care of a Department) to be included in the Cabinet.

The Cabinet.

The State Cabinet underwent considerable changes at the inauguration of the Commonwealth, as several of its Departments were transferred to the Federal Cabinet. At the present time (1913) it consists of the following Ministers: (1) The Chief Secretary; (2) Attorney General; (3) Treasurer; (4) Minister for Justice; (5) Secretary for Lands; (6) Minister for Agriculture; (7) Minister for Public Instruction; (8) Secretary for Public Works; (9) Secretary for Mines (10) Minister for Labour and Industry, and (11) Vice-President of the Executive Council, who, as a member of the Legislative Council, conducts the Government's business through that House. The Premier may take charge of whichever Department he pleases, or even content himself with a general supervision without constituting himself Ministerial head of any Department. It is also not unusual for a single Minister to be given control of more than one

of the portfolios. Thus in 1913 the Minister for Public Instruction was also Minister for Labour and Industry, whilst the Department of Lands was administered by the Minister for Agriculture.

(D) The Cabinet members are the Governor's advisers. The maxim "the King can do no wrong" applies with almost equal force to the King's representatives in the Australian States. It involves that the advisers should be held responsible for the administration of the State. Consequently, the Governor is bound to accept the advice of his Ministers in almost every administrative act.

The Governor acts with the Executive in <sup>The Governor's</sup> appointing judges, nominating members to the <sup>Powers.</sup> Legislative Council and pardoning offenders. He summons, prorogues and dissolves\* Parliament, issues the writs for a general election, appoints the President of the Legislative Council and the Ministers of the Crown, though, as already pointed out, he generally selects as Premier the leader of the strongest parliamentary party, and leaves the choice of other Ministers to him. According to Imperial instructions, however, the Governor must refuse the Royal assent to Bills (1) divorcing particular individuals; (2) making

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\* He acts on his own responsibility in dissolving Parliament.

grants to the Governor himself; (3) affecting the currency; (4) affecting the Royal prerogative, or the rights and property of His Majesty's subjects; (5) prejudicing the trade and shipping of the United Kingdom; (6) running contrary to Imperial treaty obligations, or (7) having already been refused the Royal sanction. The State Governor is still appointed by the Crown. It has frequently been urged that the choice of a Governor should be confined to citizens of the State; but an argument against this lies in the fact that the Home Government would then be dependent on the recommendation of the State Ministry which might be strongly tempted to recommend someone so far immersed in politics as to be practically incapacitated for want of "impartiality and aloofness from local political strife."\* A more vital objection is the contention that the Throne must not limit itself in selecting its representatives.

It requires but little consideration or imagination on our part to realise what a decided political contrast is offered to us in the New South Wales of 1788 and the same State of the present day. The successors of Governor Phillip have long ceased to exercise his authority. They have surrendered their

\* *Vide* W. Harrison Moore, "Commonwealth of Australia," pp. 164-5.

sceptre into the hands of the people. In common with the rest of the Australian States, and, in fact, of the civilised world, our State has sought, and is still seeking to give the most thorough and effective expression to the sentiment contained in the phrase "Vox populi vox dei." With the maintenance of a progressive system of education, a high moral tone and a sensitive social conscience, we need not fear the result.

\* \* \* \*

### LOCAL GOVERNMENT.

In the previous chapter attempts by Earl Grey to develop a system of local government in the State were referred to. It is advisable to note the developments in that direction since his time. The colony of South Australia anticipated New South Wales in the establishment of a system of municipal government by about three years, as the younger colony passed a municipal law in 1839, and had a mayor and council of Adelaide in 1840, whereas it was not till 1842 that Sydney could boast of a City Incorporation Act. Melbourne was incorporated as a town in the same year. In The System in that year also, a statute of the Imperial Parliament empowered the Governor to establish 1842 (vide pp. 32-3.) district councils in other localities. The effect

has already been noticed. The attempt to impose a local government system and to enforce certain obnoxious clauses without first referring the question to the colonists themselves retarded the development of local government generally, and the objectionable clauses were eventually repealed.

It was not till 1858 that legislation provided for the establishment of a municipality upon petition of the prospective ratepayers. By this

Municipalities Act of 1858.

Act—the Municipalities Act of 1858—the rate-payers elected the aldermen, who in their turn selected their chairman or mayor. The Council could make by-laws for the government of the town, and control roads, bridges, ferries, wharves, establish asylums, hospitals, libraries, impose tolls and rents in connection with bridges, wharves, etc.

Classification of 1867.

In 1867 all local divisions were classified into (1) Boroughs, containing at least 1,000 inhabitants and an area of not more than nine square miles, and (2) Municipal districts with at least 500 people in an area of not more than 50 square miles. Nevertheless, until 1905, only about one per cent. of the State was not directly governed by the Government in municipal matters. Since then, however,

Shire and Municipal Councils—1905.

shire government has been established, and country areas of the eastern and central divisions of the State have been constituted as shires, each governed by a "Shire Council."

Town areas are constituted as municipalities with powers of rating and borrowing on a higher scale than are allowed to the shires, because of their denser population. These Councils attend to such matters as the control of traffic, the construction and maintenance of roads, lighting, prevention of fire and flood, and administering the Acts dealing with public watering places, impounding, cattle slaughtering, public health and police offences. They may also acquire the right on petition to control or maintain the water, gas and electric supplies, ferries, fire brigades, abattoirs, parks, theatres and public halls, art galleries, libraries, museums, sale of fish, meat, etc. At present there are 190 municipalities and 134 shires in existence in New South Wales. The shires vary in area from 36 to nearly 6,000 square miles.

The expense of local government is borne by Local Government Finance. A revenue derived in shires from rates on the unimproved capital value of from 1d. to 2d. in the £; in municipalities, from rates which must be partly or wholly levied on the unimproved capital value, and may be partly levied on the improved capital value, and which may range from 1d. in the £ up to, in some cases, as high as 1s. or even more. The Government distributes a sum of not less than £150,000 per annum among shires as endowment on rates collected; and it may grant endowment to municipalities when necessary. Municipal councils and

shire councils, when acting on behalf of "urban areas" within their shires—for with respect to these the shire councils have the powers of municipal councils—may borrow up to ten per cent. of the unimproved capital value of ratable land within the municipality or "urban area," provided that (1) the ratepayers express approval by means of a poll; (2) the Governor approves; and (3) a loan rate is levied to provide the interest on the loan and a sinking fund. As a general rule (aside from the "urban area" loans) shire councils are allowed to borrow only "temporary loans" not exceeding one-third of the estimated revenue from the rates, or loans to repay old loans of municipalities that have been dissolved and added to the shire.

**The City Council.** The most important of the municipalities is, of course, the City of Sydney. The City Council consists of twenty-six aldermen, representing thirteen wards (two to each ward) elected simultaneously every three years by three classes of electors:—(1) property owners; (2) leaseholders, and (3) tenants and lodgers after six months' residence paying at least £10 annual rent. The Lord Mayor is chosen by the aldermen from amongst themselves.

## APPENDIX TO CHAPTER III.

### THE ACT OF 1855.

18 and 19 Vic. cap. 54. July, 1855.

To enable Her Majesty to assent to a Bill as amended of the Legislature of New South Wales to confer a Constitution on New South Wales and to grant a civil list to Her Majesty.

[The Act gives power to Her Majesty to assent to a Bill in the Schedule from which the clauses below are taken.]

#### A BICAMERAL LEGISLATURE.

I. There shall be in place of the Legislative Council now subsisting, one Legislative Council and one Legislative Assembly to be constituted in the manner hereinafter prescribed and within the colony of New South Wales, Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace, welfare, and good government of the colony, provided that all Bills for appropriating any part of the public revenue, for imposing any new rate, tax, or impost, shall originate in the Legislative Assembly of the colony.

#### COUNCIL NOMINATED BY THE CROWN.

II. For the purpose of composing the Legislative Council of New South Wales, Her Majesty shall authorise the Governor, with the advice of the Executive Council to summon to the said Legislative Council, such persons being not fewer than twenty-one as the Governor and Executive Council shall think fit . . . and from time to time to summon to the Legislative Council such other persons as the

Governor and Executive Council shall think fit . . . no person shall be summoned to the Legislative Council who shall not be of the full age of twenty-one years, a natural born subject of Her Majesty, or naturalised; provided also that not less than four-fifths of the members shall consist of persons not holding any office of emolument under the Crown except officers of Her Majesty's sea and land forces on full or half-pay or retired officers on pension.

#### DURATION OF MEMBERSHIP.

III. The members of the first Legislative Council shall hold their seats for five years; but all future members who shall be summoned thereto after the expiration of the said five years shall hold their seats therein for the term of their natural lives, subject nevertheless to the provisions hereinafter contained for vacating the same, and for altering and amending the future Constitution of the colony. [Resignation, absence without leave for two consecutive sessions, allegiance to a foreign State, insolvency, treason, felony, or infamous crime terminates membership.]

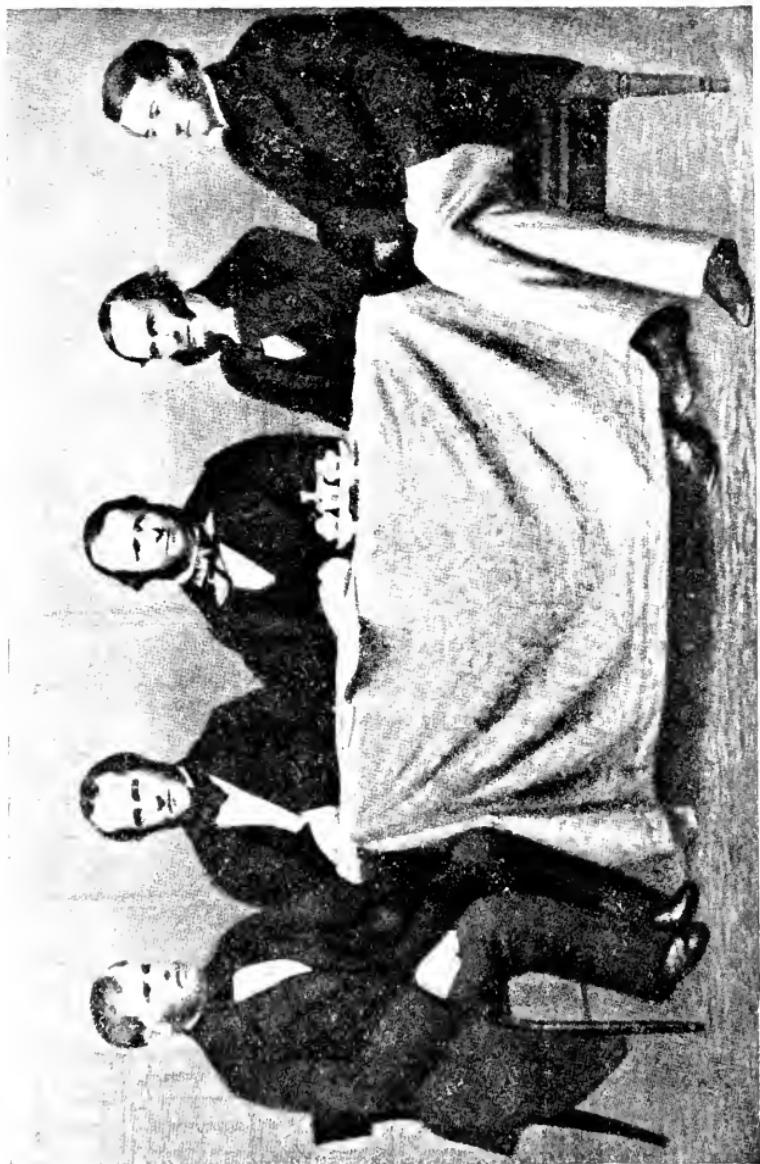
#### SOUTHERN BOUNDARY OF NEW SOUTH WALES MORE DEFINITELY SPECIFIED.

V. And whereas by the Act of the 14th year of Her Majesty, chapter 59, it is enacted that the territories therein described as bounded on the north and northeast by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the eastern boundary of the colony of South Australia should be erected into a separate colony to be known and designated as the colony of Victoria: and whereas doubts have been entertained as to the true meaning of the said description of the boundary of the said colony, it is hereby declared and enacted that the whole water-course of the said River Murray, from its source therein described to the Eastern boundary of the colony of South Australia is and shall be within the



THE FIRST NEW SOUTH WALES MINISTRY

*Reading from left to right*—Thomas Holt (Colonial Treasurer), William Montagu Manning (Attorney-General), Stuart Alexander Donaldson (Premier and Colonial Secretary), John Bayley Darvall (Solicitor-General), George Robert Nichols (Auditor-General)



territory of New South Wales. . . . Provided that it shall be competent for the Legislatures of the said two colonies by laws passed in concurrence with each other to define in any different manner the boundary line of the said two colonies along the course of the River Murray and to alter the other provisions of this section.

#### THE PRESIDENT OF THE COUNCIL.

VII. The Governor shall have power and authority from time to time to appoint one member of the Legislative Council to be President thereof, and to remove him and appoint another in his stead.

#### LEGISLATIVE ASSEMBLY.

X. The Legislative Assembly shall for the present consist of fifty-four members to be elected by the inhabitants having any of the qualifications mentioned in the next section.

#### QUALIFICATIONS OF ELECTORS.

XI. [Qualifications of elector:—Twenty-one years of age; natural born or naturalised; six months' residence; owner of £100 freehold, or householder, or leaseholder paying £10 rent per annum, or a pasture license holder, or one earning a salary of £100, or occupying a room for a rental of £10, or paying £40 for board and lodging.]

XV. It shall be lawful to alter the system of representation.

#### QUALIFICATIONS OF MEMBERS.

XVI. Any person who is absolutely free and is qualified and registered as a voter, shall be qualified to be elected as a member of the Legislative Assembly for any electoral division.

#### DISQUALIFICATION.

XVIII. Any person holding any office or profit under the Crown or having a pension from the Crown

shall be incapable of being elected as a member of the Legislative Assembly unless he be one of the following official members of the Government, that is to say, the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney-General and Solicitor-General or one of such additional officers not being more than five as the Governor, with the advice of the Executive Council may from time to time declare capable of being elected a member of the said Assembly.

#### QUINQUENNIAL PARLIAMENTS.

XXI. Every Legislative Assembly shall continue for five years from the day of the return of the writs for choosing the same and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.

#### ANNUAL SESSIONS.

XXXI. There shall be a session of the Legislative Council and Assembly once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the Legislative Council and Assembly in one session and the first sitting in the next session.

#### DISPOSAL OF CROWN LANDS.

XLIII. It shall be lawful for the Legislature of this colony to make laws for the sale, letting, disposal and occupation of the waste lands of the Crown within the colony.

#### RESTRICTION ON POWER TO LEVY CUSTOMS DUTIES.

XLIV. It shall not be lawful for the Legislature of the colony to levy any duty upon articles imported bona fide for the supply of Her Majesty's land and sea forces, nor to levy any duty, impose any prohibition, or restriction, or grant any exemption from any drawback or other privilege upon the importation

or exportation of any articles, nor to enforce any dues or charges upon shipping contrary to or at variance with any treaty or treaties concluded by Her Majesty with any foreign power.

#### NO DIFFERENTIAL DUTIES.

XLV. [The same as section 27 of the Act of 1850.]

#### CIVIL LIST.

XLIX. (Provides a Civil List of £64,300 to Her Majesty for payment of Governor, Ministers, Judges, etc.)

#### APPROPRIATION OF REVENUE.

LIV. It shall not be lawful for the Legislative Assembly to originate or pass any vote, resolution, or Bill for the appropriation of any part of the Consolidated Revenue Funds, or of any other tax or import to any purpose which shall not have been first recommended by a message of the Governor to the said Legislative Assembly during the session in which such vote, resolution, or Bill shall be passed.

#### CROWN LANDS.

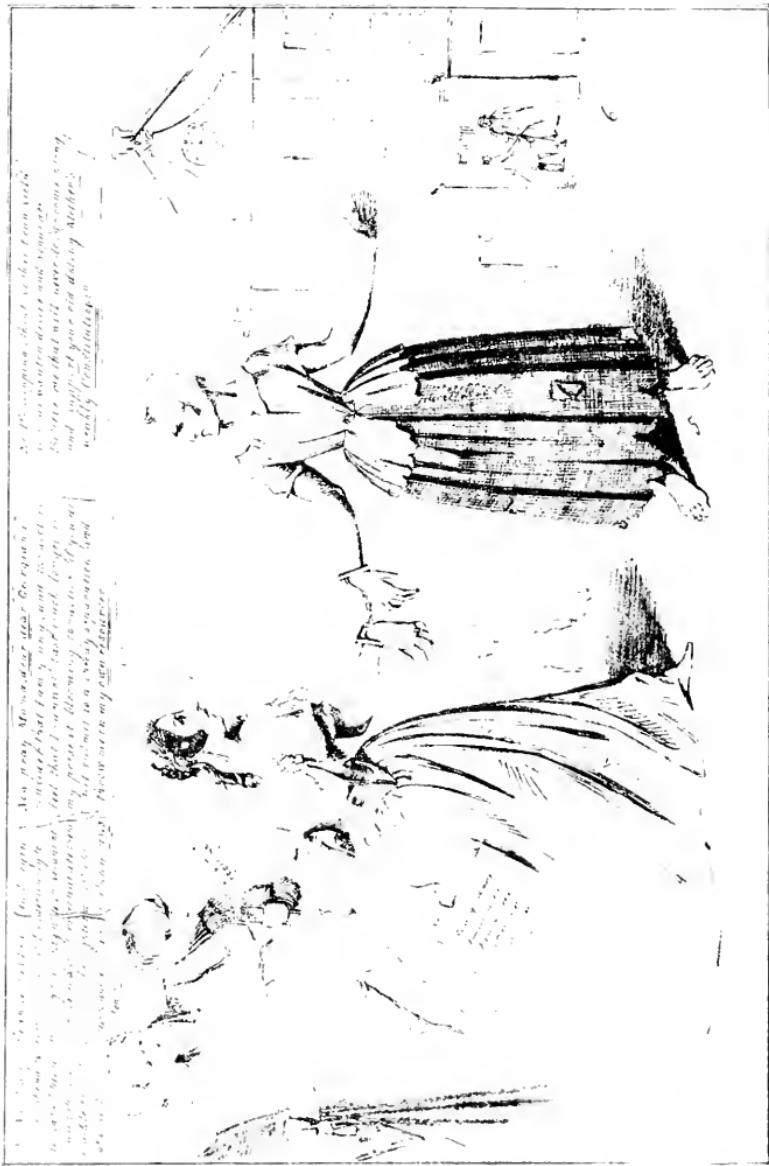
LVIII. The entire management and control of the waste lands belonging to the Crown in the colony of New South Wales, and also the appropriation of the gross proceeds of the sales of any such lands, and of all other proceeds and revenues of the same from whatever source arising, including all royalties, mines and minerals, shall be vested in the Legislature of the colony.

## CHAPTER IV.

### THE OTHER COLONIES.

**New South Wales** —illustrative of every stage of development. The progress from the Crown Colony stage to that of responsible government has now been traced in the case of New South Wales. In no other instance do the five stages stand out so distinctly as in the Mother State. Tasmania, Victoria, and Queensland had no existence apart from New South Wales until sufficient progress had been made to dispense with purely autocratic rule. South Australia commenced its career, as we shall see, with an advisory Council. Until the enactment of the Australian Colonies' Government Act of 1850, the existing colonies, New South Wales, Van Diemen's Land, South Australia, and Western Australia, were in various stages of constitutional progress. The effect of this measure was to bring all of them (with the exception of Western Australia) more or less into line within the next few years. By the year 1856 New South Wales, Victoria, South Australia and Tasmania (as well as New Zealand) were enjoying the privileges and advantages of a system of





A POLITICAL SKETCH, ENTITLED "BEAUTIFULLY LINKED!!! MIGHT V. RIGHT," ISSUED IN 1844

The Sketch refers to the desire of Port Phillip for Separation from New South Wales  
*The figures from left to right are—1., 2., 3., the three Sydney residents representing Port Phillip,  
 viz., Dr. Lang, Thomas Walker, and Dr. Chas. Nicholson; 4., Port Phillip (holding scroll, which  
 reads: "Excess of Ordinary Revenue over the Expenditure of the District of Port Phillip per annum  
 £ 20,000"); and 5., New South Wales, with the features of Governor Gipps.*

responsible government. In every instance General the bicameral system of Legislature was Resemblances adopted; in every colony also the Assembly, or Lower House, as it is rather inappropriately termed, was based on popular election, and in the majority of cases electoral qualification depended in the first instance on possession of property. Manhood suffrage was a later development, and adult suffrage still more recent. South Australia alone commenced with the more thoroughly democratic system of manhood suffrage. In every case, again, the Assembly guarded jealously its right to initiate money bills, enforcing the principle that had been recognised in England for over two centuries, "that all aid and supplies and aids to His Majesty in Parliament are the sole gift of the Commons; and it is the undoubted right of the Commons to direct, limit, and appoint in such Bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which ought not to be changed or altered by the House of Lords." The various colonies retained the right to amend their own Constitutions, though such measures as well as those affecting the salaries of Governors are still reserved for Royal sanction.

But while the Colonial Constitutions resemble one another in their general features, there are considerable differences of detail,

especially as regards the Legislative Council. Consequently a brief glance at each State seems indispensable.

### VICTORIA.

**Early Settlement and Representation.** Port Phillip had been discovered in 1802, but it was more than three decades later before a successful settlement was effected, Collins' attempt to establish a penal settlement in 1803 having failed. As the result of the enterprise of the Henty Brothers, Batman and Fawkner, settlements were made at Portland in 1834, and at Port Phillip in 1835, and in 1837 Lonsdale was sent as Resident Magistrate, and Latrobe, two years later, as Superintendent.

Between 1842 and 1851 the Port Phillip district elected six representatives to the Legislative Council of New South Wales, five members representing the district and one the town of Melbourne. Distance from Sydney, as has already been stated, and the consequent inconvenience and loss of time occasioned through attendance at the Council, resulted in the electors of Port Phillip choosing Sydney inhabitants to represent them. This was manifestly a disadvantage, and it was but natural that an agitation for political separation from New South Wales should quickly develop. Their dissatisfaction with the con-

stitutional conditions was made dramatically prominent by the election of Earl Grey, Secretary of State for the Colonies, as the Melbourne representative. This farcical election had the effect of focussing attention on the agitation for separation, and the Committee on Trade and Plantations made a report favourable to the proposal. The main purpose of the Imperial Act of 1850 was to effect the separation, and with the issue of the writs for <sup>Separation—1851</sup> its own Legislative Council, Victoria commenced its existence independent of New South Wales on the 1st July, 1851, with a partially representative Council of 30 members. Ten of the members were nominated by the Lieutenant-Governor and twenty elected by persons owning freehold to the value of £100, occupying a house at an annual rent of £10, or holding a lease or pasture license. The powers of the new Council were similar to those exercised by the corresponding body in New South Wales. They were empowered to make laws for the good of the colony, to impose customs duties and other taxes, and to appropriate the public revenue to the public service, though the Governor's prior recommendation was necessary in the latter case. The sale of Crown lands remained with the Crown, as was the case in New South Wales.

The rapid increase of population consequent upon the discovery of gold cleared the way for

**Responsible Government.** the introduction of responsible government, and in 1853 the infant colony was busy drafting another Constitution for itself. The bicameral system of Legislature was accordingly introduced in 1856. Parliament consisted of two elected chambers—a Legislative Council and a Legislative Assembly. It was granted amongst other powers, the control of the sale and appropriation of Crown lands and power to amend still further its own Constitution. The Councillors, originally thirty in number, and holding their positions for ten years, were owners of freehold worth at least £5,000 or returning £500 per annum. The minimum age for Councillors was fixed at thirty years. They were elected by owners of £1,000 worth of freehold, graduates, members of the legal and medical professions, ministers of religion, and naval and military officers. Five members retired every two years. The Assembly was numerically twice as strong as the Council, and was elected for five years, though subject to earlier dissolution. Membership here too was fenced in by a solid property qualification, being open to owners of freehold valued at £2,000, or returning £200 per annum. A slight property qualification also restricted the number of electors; but after one year's experience this qualification was entirely abolished as regards Assembly elections, and

**Details of the Constitution.**

manhood suffrage instituted. The qualifications affecting the Council were subsequently reduced, and at present possession of freehold worth £50 is sufficient qualification for membership, whilst small freeholders, tenants and lessees paying an annual rent of £15, graduates, matriculated students, legal and medical gentlemen, ministers of religion, and naval and military officers are included amongst Council electors. Secret ballot was established from the very outset (1856). Plural voting in the case of Assembly elections was abolished in 1899, and, though it is still allowed in the Upper House elections, in that an elector may vote once in every province in which he possesses the necessary property, the large size of the electoral districts practically prevents the plural voter from exercising more than one vote. Voting by post was established in 1900. This, however, is of little advantage to the electors of the Councillors, since at a general election for the Council, an elector by virtue of a property qualification in two or more provinces may vote in every province for which he is enrolled, only if he votes personally; but if he votes by post for any one province, he is precluded on that polling day from voting for any other.

At present the Council consists of thirty-four members, returned by seventeen districts, and holding their seats for six years, one-half

The present Council and Assembly.

(that is to say, one member for each district) retiring triennially. The Assembly contains sixty-five members, returned by the same number of electorates, under the system of adult suffrage. In 1911 an Act was passed for compulsory preferential voting at elections for the Assembly, the voter placing a number (1, 2 or 3, etc.) in order of his preference, opposite the names of *all* the candidates.\*

**Constitutional Experiments.** Two interesting constitutional experiments have been tried in Victoria. The first was the election in 1903 of representatives of a special class in the community. To the Council the State railway and public servants elected one representative, whilst for the Assembly two members were chosen by the railway employees and one by the public service. The provision was the outcome of a fear that under ordinary conditions this class of elector might, by reason of its numerical strength, unduly control the general elections. However, the experiment was abandoned in 1906. The second experiment had to do with deadlocks, Victoria having had a few bitter experiences of controversy between the two Houses. The clause, which is still in force, provides that a simultaneous dissolution of the two Houses shall take place if the Council twice reject a measure passed by the Assembly, provided

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\* *Vide* Section on Tasmania for explanation of preferential voting.

that one rejection has occurred before, and the second after, a dissolution of the Assembly. The Council's power respecting appropriation bills is limited to accepting or rejecting them *in toto*; it may not amend them, though it may suggest alterations once at each of three stages of the bill, viz. (a) when in committee; (b) on the report of the committee, and (c) on the third reading. The Constitution also limits the Ministry to eight members, not more than two to be chosen from the Council and six from the Assembly. But a Minister from the Assembly has the right to sit in the Council in order to explain Government measures, though he is not entitled to vote except in the House to which he belongs.

### QUEENSLAND.

Moreton Bay was first used by white people as a penal settlement in 1824, persons convicted of offences in New South Wales being sent thither. The discovery of the rich pastoral land of the Darling Downs soon led to the migration of free settlers northwards, and as the population increased, the "Northern District of New South Wales" was The Northern constituted a distinct electoral division in 1843. District of New South Wales. The inhabitants immediately around Moreton Bay, however, benefited little from this political distinction, since the constituency ex-

tended as far south as Port Macquarie and the Upper Hunter Valley, whilst the head polling place was situated at Raymond Terrace on the Hunter. Their voice in politics was very aptly described as an "inaudible squeak." But with the next few years the population of Moreton Bay territory grew steadily, and by 1851 it was sufficiently important to boast a member of its own. This representation of one was increased to two in 1853, four (including the Clarence River district) in 1855, and nine in 1858. Stimulated by Victoria's success, the Northerners started an agitation for separation. As early as 1846 Lord Stanley (afterwards the Earl of Derby) had announced the necessity in the near future of erecting a new colony north of New South Wales, and the Constitution Act had anticipated this necessity by empowering the Queen to establish the colony whenever it seemed desirable so to do. Consequently, in 1859 all the territory north of

**Separation in 1859** the 29th parallel and east of the 141st meridian was cut off from New South Wales and erected into a separate colony under the name of Queensland. For some time the fate of the Richmond and Clarence River districts hung in the balance, as there was a fierce demand that these, too, should be attached to the new colony; but eventually it was decided to leave them to the parent colony. (See also page 6.)

One of the privileges of Queensland's late

SIR CHARLES GAVAN DUFFY



ALFRED DEAKIN





birth was that it enjoyed from the outset full rights of representative and responsible government. The Constitution of the Queens- Similarity of the Constitutions of New South Wales and Queensland. land Parliament is in its general features practically a facsimile of that in operation in New South Wales, even to the extent of having a purely nominee Legislative Council. It is, therefore, unnecessary to go into details concerning the minor points of difference beyond observing that the younger colony still admits plural voting. Freeholders of property worth £100, and leaseholders paying £10 per annum may vote in every district in which their property is situated. A system of optional preferential voting is employed in the Assembly elections by which an elector is required to strike out the names of candidates for whom he does not intend to vote, and he may, if he so desire, show his preference for candidates by placing the figures 1, 2, 3, etc., after their names. When no candidate is returned by an absolute majority, all but the two highest on the poll are deemed defeated, and the votes of the supporters of defeated candidates are, as far as the ballot papers allow, distributed between the two undefeated candidates in accordance with the preference shown by the voters. When two candidates are to be returned, four names are left in for the second count.

## SOUTH AUSTRALIA.

The First Settlement. South Australia came into existence as an experiment. Mr. Edward Gibbon Wakefield's theory was being put to the test. He asserted that if land were sold at a sufficiently high figure, the proceeds could be devoted to bringing from England a labouring class who would perforce be content to labour for the upper classes. In this way a leisured and cultured society would be rendered possible in the southern continent. The first settlers arrived in 1836 under Captain Hindmarsh, who was appointed Governor. The control and disposal of land and land revenues were at first placed in the hands of special Commissioners. The legislative and administrative functions were left, however, to the Governor, assisted by the Chief Justice, the Colonial Secretary and the Advocate-General. Wakefield's experiment soon proved unsatisfactory, and the colony had to be remodelled as an ordinary Crown Colony of the advanced type. The power to dispose of Crown lands was accordingly transferred from special Commissioners to the Governor in 1842, and the colony was granted a nominee Legislative Council, consisting of the Governor and seven others—three officers of the Government and four non-officials. The Council met for the first time in October, 1843. At the same time (1842) the Queen was empowered

A Nominee Council.

to establish a partly elective Council whenever the colony seemed sufficiently developed to justify the change. Nine years passed, however, before such a body was created. Then, in 1851, the colony received a Council constituted on similar lines to that already in existence in New South Wales. One-third of its members (8) were nominated by the Governor; the remaining two-thirds (16) were elected by qualified inhabitants. In accordance with powers granted by the Imperial Act of the previous year, South Australia proceeded to draft a Constitution for herself, with the result that in 1856 her Parliament consisted of two Houses, with control over the Executive. The South Australian Council is elective. In 1856 Responsible Government.

it consisted of eighteen members elected for 12 years, six retiring every fourth year; but since 1902 the term of membership has been reduced to six years, and one-half (that is nine) of the members retire at the end of every triennial period. For Council elections the State is divided into four electorates, each returning four members (two triennially) except the central division, which returns six (three triennially). Councillors must be not less than thirty years of age, and resident in the colony for at least three years. The qualifications of Council electors are based on property.

As regards the election and composition of

the Assembly, South Australia proved herself far more democratically disposed than any of her sister colonies. In the first place, the lifetime of her Assembly was from the outset limited to three years, whereas all the other colonies originally adopted the quinquennial limit. Secondly, the colony dispensed with any property qualification for the Assembly electors. Manhood suffrage was decided upon as early as 1856, and this was converted into adult suffrage in 1894. That is to say, women were entitled to vote in South Australia some years before they enjoyed a similar privilege in the neighbouring colonies, unless we include New Zealand, where the privilege was extended to women one year earlier. The Assembly consists of forty members, representing twelve electorates.

**Provision in case of Deadlocks.** One interesting feature in the South Australian Constitution is a special provision, adopted in 1881, to overcome deadlocks between the two Houses. According to this enactment, if the Assembly passes a measure in two successive Parliaments—*i.e.*, once before and once after a dissolution, and the Council rejects it on both occasions, the Governor may either dissolve the two Houses simultaneously, or else provide for the election of additional members to the Council in order to secure the necessary agreement between the two Houses.

## WESTERN AUSTRALIA.

The first English settlement in the western portion of the continent was founded in 1826, when a small detachment of soldiers instituted a settlement at King George's Sound, on the site of Albany. Three years later, Captain Stirling, shortly afterwards created Lieutenant-Governor, established a colony of free settlers Originally a Free Settlement. on the Swan River. Misfortune overtook the small community through a faulty land settlement scheme, and it suffered from want of population; consequently, convicts were willingly received in 1850, as the nucleus of a labouring class. Transportation continued for eighteen years, and was not finally discontinued until 1868, by which time the population had increased nearly fourfold. The colony Constitutional Progress. was at first administered by the Governor and Progress. an Executive Council of four officials, whilst in 1831 a small Legislative Council consisting of the same five officials was also established. In 1839 four unofficial nominees were added to the Legislature, and in 1868 it consisted of six nominated officials and six non-officials, the latter appointed on the recommendation of the different districts in the colony. With the cessation of convict transportation the way was cleared for a more satisfactory system, and between 1870 and 1889 Western Australia enjoyed partially representative government.

The Legislature consisted of eighteen members, two-thirds of whom were elected for five years by property owners. Subsequently, the members were increased to twenty-six, nine being nominated. The qualification for membership was the possession of £1,000 worth of freehold, and for electors' rights, the possession of £50 freehold, or occupancy of a house rented at £10 per annum.

The agitation for responsible government commenced as early as 1873, but the smallness of the community caused the English Government to refuse the petition. The agitation was revived in 1887, and two years later the Council was unanimous on the question.

**The Present Constitution.** Thereupon responsible government was inaugurated in 1890; and as in the other colonies Parliament became bicameral. The Legislative Council was a nominated body until the colony's population exceeded 60,000, when the local Parliament, exercising its power of amending the Constitution, decided on a Council consisting of members elected by freeholders owning £100 freehold, householders paying £25 rent per annum, and lease and Crown license holders paying £10. The Councillors, numbering thirty, are returned by ten electorates, and hold their seats for six years, one-third retiring every two years. The Assembly consists of fifty representatives returned by as many electorates. A system

of "contingent" or preferential voting was brought into operation in 1908, and in 1911 it was made compulsory. It is very similar in its operations to the Victorian system.

### TASMANIA.

Van Diemen's Land was, from its settlement in 1803 until 1825, under the jurisdiction of the Governor of New South Wales. The Lieutenant-Governor acted in accordance with instructions received from headquarters, and all cases for the courts of justice were originally tried in Sydney. A Deputy Judge-Advocate arrived in the island in 1806; but there were doubts as to whether courts could be legally set up in Van Diemen's Land, so that his office was a sinecure, and no cases were tried by him. It was not till 1816 that the first court was opened, provision having been made for the establishment of a Lieutenant-Governor's court, with power to decide cases involving sums under £50. In 1821 a circuit court was created at Hobart, and the Act of 1823 made provision for the political separation of the island, which was effected two years later (1825). Van Diemen's Land was given its own supreme court, and its own Executive and Legislative Councils (the latter consisting of seven persons) all on the New South Wales pattern. The administration Early Connection with New South Wales. Separation, and Constitutional Progress.

tor, though nominally designated Lieutenant-Governor, had all the powers of a Governor, inasmuch as the Governor of New South Wales no longer interfered in the conduct of the island's affairs. The constitutional changes made by the Act of 1828 took effect in Van Diemen's Land also; but the little colony was left behind in 1842, when New South Wales was allowed to elect two-thirds of her Councillors. Not until 1850 did Van Diemen's Land enjoy this privilege. In common with Victoria and South Australia, the colony was brought into constitutional line with the Mother State by the Imperial Act of that year which, as we have already seen, permitted the various colonial Legislatures to draft Constitutions for themselves. Tasmania, which in 1856 had adopted the new name so as to free herself from the stigma attaching to the old one, elected to have a bicameral system.

The Present Constitution.—Unlike the system in operation in the parent colony, both Council and Assembly were to be elective Houses, the electoral franchise being on either a property or an educational basis. At the present time Councillors are appointed for six years, and are elected by freeholders, leaseholders, medical and legal practitioners, clergymen, naval and military officers; whilst adult suffrage obtains in the election of members to the Assembly. The Legislative Council at present consists of

eighteen members, and the Assembly of thirty. One effect of an elective Council has been that this Chamber has claimed equal rights with the Assembly in all respects except that of originating money bills, and it even ventures to amend these.

Tasmania was more advanced than the other Preferential Voting States in her method of electing her representatives, in that she was the first to adopt a modification of the Hare system of election. The State is divided into five electorates, each returning six candidates. Electors may vote for any number of candidates, not less than three, but must signify the order of their preference by placing the numbers 1, 2, 3, 4, etc., after the names of the candidates they favour. By a system of counting and transferring votes from rejected candidates and candidates who have surplus support to those next preferred by the elector—a system that appears intricate to the average elector, but is in reality very simple, and, with properly prepared tables and an efficient staff, almost automatic—the final result corresponds with the relative strength of the political parties concerned. In 1909, for example, one political party had, according to the ballot-box returns, 19,067 supporters, whilst 29,893 voters gave their support elsewhere. The smaller party was, therefore, entitled to 11·69 representatives or to the nearest integer, 12. This was pre-

cisely the strength of the party in the next Assembly. This guarantee of the proper representation of minorities, together with the fact that the electors find no more difficulty in recording their vote than in the more usual method, has led the Tasmanians to regard their system as the most advanced and most satisfactory system of voting employed in any civilised country.\* In the system of representation in operation in New South Wales it is possible for one political party having large minorities, say, in any six contiguous electorates to be entirely unrepresented so far as these particular electorates are concerned, simply because the opposite party, by commanding slight majorities in each of the six, can "scoop the pool." In Tasmania, these six electorates would be welded into one, and the system of preferential voting would ensure the representation of the parties in proportion to their relative strength. No party would be unrepresented, unless by reason of its numerical weakness it were not entitled to representation. The system of "preferential" voting is also applied to by-elections when one candidate only is to be returned, and secures

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\* The elections of 1910 and 1913 seem to suggest that when the electors throughout the State are nearly equally divided into two parties, the result does not allow of sufficient preponderance to either party in the Assembly to carry on the government without undue embarrassment. But as a similar result is possible under other electoral systems, it is scarcely correct to regard it as a defect peculiar to the preferential system.

an absolute majority for the successful candidate, without recourse to a second ballot.

### NEW ZEALAND.

New Zealand has interest for us because it is a part of Australasia, and was for a short time under the administration of the Governor of New South Wales. Moreover, it still remains, if not an actual, at least a potential, member of the Australian Commonwealth.

New Zealand was annexed by Captain Cook, and in 1840 treated more definitely as a dependency of New South Wales. But on the 3rd May, 1841, it was constituted a separate colony, with Auckland as its seat of Government. The administration was in the hands of <sup>Administration in</sup> the Governor and a Council of six, including <sup>1841.</sup> three officials—the Colonial Secretary, Colonial Treasurer and Attorney-General. In 1852 an Act was passed by which representative government of a somewhat federal nature was <sup>A Federal System</sup> established. The colony was divided into six <sup>1852.</sup> provinces (subsequently increased to nine), each with its elected Superintendent and elected Provincial Council. These Councils were elected for four years, though they could be dissolved earlier by the Governor. They had control of education, immigration, harbours, construction of roads and bridges, and, a little later, of the sale of Crown Lands. The

Governor could veto the ordinances of the Council or the election of the Superintendent. The whole of the provinces were united for general purposes, the government being vested in the Governor, Legislative Council and House of Representatives. The Council consisted of the Governor's nominees, who held their seats for life, and the House of Representatives of elected members, the franchise being on a liberal property basis. The first General Assembly met in 1854. No specific mention of responsible government had been made in the Act, but attempts to form mixed Ministries of members and non-members of Parliament failed; and, when the Secretary for the Colonies had pointed out that an Act establishing responsible government was unnecessary, responsible Ministries became the order of the day.

A Provincial System—1876.

After over two decades of government on the above lines, in the course of which the capital was shifted to Wellington (1865), the General Assembly, availing itself of its powers to amend the Constitution, made a complete sweep of the provincial system, by abolishing the provinces and subdividing the colony into counties (1876). This change established local government. From that date the Government of New Zealand has been on unitary in place of federal lines. The members of the Legislative Council are still nominated by the

Governor, but since 1891 the appointment has been for seven years, and not for life, though reappointment is permissible. Two Councillors are Maoris. The House of Representatives consists of eighty members—four representing Maori constituencies. The House is elected for three years, but according to the usual operation of the British system of government, it is subject to dissolution earlier. Plurality of voting, (*i.e.* the granting of more than one vote to any one person) was abolished in 1889, and four years later women were given the right to vote, though not to enter Parliament. A property qualification was recognised until 1896, when it was abandoned in favour of universal franchise, one year's residence in the Dominion, and three months' in an electorate entitling one to vote. Since September, 1907, New Zealand has been designated the Dominion of New Zealand.

## THE STATE CONSTITUTIONS.

### A Summary.

#### A.—**Legislative Council**—

##### (1) *Composition.*

New South Wales:—Not less than 21 members; present number, 57; at least four-fifths to be of the non-official class; no property qualification.

Victoria:—34 members of at least 30 years of age, and possessing freehold of the annual value of £50; they represent 17 provinces.

Queensland:—Present number 40 members, at least four-fifths to be of the non-official class.

South Australia:—18 members, of at least 30 years of age, and 3 years' residence; the State is divided into 4 electorates, 3 returning 4 members each, and 1 returning 6.

Western Australia:—30 members, of at least 30 years of age, and 2 years' residence, and representing 10 electorates (3 members for each electorate).

Tasmania:—18 members, of at least 30 years of age, and 5 years' residence (or the two years immediately preceding the election), representing 15 electorates.

New Zealand:—At present 39 members (including 2 Maoris), though the number is not limited.

(2) *How chosen.*

New South Wales:—Nominated for life by the Governor, with the advice of the Executive Council.

Victoria:—Elected for six years by £10 freeholders and £15 leaseholders, graduates, and Victorian matriculated students, doctors and lawyers, ministers of religion, naval and military officers.

Queensland:—As in New South Wales.

South Australia:—Elected for 6 years (one-half every 3 years) by freeholders with estate worth £50, leaseholders (£20 per annum), householders (£17 rent per annum), Crown leaseholders, postmasters, stationmasters, schoolmasters (residing on official premises), police officers in charge of stations, and ministers of religion.

Western Australia:—Elected every 6 years (one-third every two years) by freeholders with estate worth £50, householders (£17 rent per annum), leaseholders (£25 per annum), Crown lease or license holder (£10 per annum), or municipal electors

with property (of annual ratable value £25).

Tasmania:—Elected for 6 years by free-holders (£10 per annum), or occupiers of property (£30 per annum), graduates, doctors, lawyers, ministers of religion, and officers of army or navy; 3 members retire every year.

New Zealand:—Nominated by the Governor for a period of 7 years, and eligible for reappointment.

(3) *Allowances to Members.*

None in New South Wales, Victoria or Queensland; £200 per annum in South Australia; £300 in West Australia; £150 in Tasmania; £200 in New Zealand, with deductions of 25s. per day during session in case of absence exceeding 14 days.

**B.—Legislative Assembly—**

(1) *Composition.*

New South Wales:—90 members, each representing 1 electorate.

Victoria:—65 members resident for at least 2 years; representing 65 electorates.

Queensland:—72 members, representing 72 electorates.

South Australia:—40 members, representing 12 electorates.

West Australia :—50 members, representing 50 electorates.

Tasmania :—30 members, representing 5 electorates (6 members for each electorate).

New Zealand :—80 members, representing 80 electorates. The Lower House is known as the House of Representatives, and 4 Maoris are included amongst the members.

(2) *How chosen.*

In every case (a) adults of either sex are the electors. (b) membership ceases with the dissolution of Parliament which (c) is limited to a 3 years' existence.

New South Wales :—Elected by the adults who have resided 6 months in the Commonwealth, 3 in the State, and 1 in the electorate. A second ballot is taken between the two highest candidates in the first ballot when the latter does not give an absolute majority to any candidate.

Victoria :—Elected under a system of compulsory preferential voting by adults of 6 months' residence in the State and 1 month in the district.

Queensland :—Elected under a system of optional preferential voting by adults

of 12 months' residence. A freeholder or leaseholder may elect to be enrolled for the district in which his estate is situate.

South Australia:—Elected by adults of 6 months' continuous residence in the State and 1 month in the district.

West Australia:—Elected under a system of compulsory preferential or "contingent" voting by adults of 6 months' residence in the State and 1 month in the district.

Tasmania:—Elected under a system of preferential voting by adults of 6 months' residence.

New Zealand:—Elected by adults of 1 year's residence in the Dominion and 3 months' in the electorate.

(3) *Allowances to Members.*

New South Wales:—£500 per annum.

Victoria:—£300 per annum.

Queensland:—£300 per annum.

West Australia:—£300 per annum.

South Australia:—£200 per annum.

Tasmania:—£150 per annum.

New Zealand:—£300, with deductions for non-attendance during session.

## CHAPTER V.

### CONDITIONS AND CHARACTERISTICS OF FEDERALISM.

Federation is by no means a purely modern idea, as history reveals federal systems in operation between two and three thousand years ago. In ancient Greece, for example, alliances or leagues of a federal character were formed between one city state and another for the purpose of protection against their more powerful enemies. Yet it is only within comparatively recent times that the theory of federation has been clearly comprehended in all its fulness, or that the acceptance of certain federal principles has become consciously regarded as a necessary fundamental condition of union. Statesmen are now thoroughly seized with the complex relations of the parts to the whole within the union. They have learnt how to form a larger entity out of smaller entities without destroying the latter, or confusing essentials and accidentals.

*Federalism—  
Ancient and Mod-  
ern.*

And here we have, at the outset, the main characteristic of a federal system. It differs from other systems of government in attempt-

*The main  
Characteristic of  
Federalism.*

ing to bring together under a political bond a number of States without sacrificing their individuality. The States still retain their separate existence and independence in some particulars, though they surrender their powers to a central government in matters that affect the Federated States in common. Thus we have sovereign powers existing within a sovereign power, and neither can encroach on the sovereignty of the other. As Bryce expresses it "The problems which all federated nations have to solve is how to secure an efficient central government, and preserve national unity, while allowing free scope for the diversities, and free play to the authorities, of the members of the federation."

**Necessary conditions.** A federal form of government is possible only under certain conditions. The fundamental conditions are set out by Dicey.

- (1) The countries desiring to federate must have some community of race, language, history or economic interest.
- (2) There must be a strong desire to unite for some purposes, and yet to retain provincial independence in other matters. The states "must desire union and must not desire unity." \*

One writer adds a third condition, which, however, applies to the successful maintenance

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\* Dicey, "The Law of the Constitution," p. 137.

of other forms of government as well as of the federal. It requires "a high degree of political capacity and a habit of observance of law."

There would also be some justification for considering geographical adjacency as a fourth condition,\* since no federation has yet been formed where that condition was absent. The scattered character of the British Empire is considered by some to be an unanswerable objection to the establishment of an Imperial federation.

Federal systems may be divided roughly into two classes, according to the extent of the powers granted to the central government. In some, the powers of the federal body are considerably restricted, and the authority and scope of the provincial bodies remain but little affected. Such a system is known as a *Confederation* or *Staatenbund*. The term is particularly applicable to a system in which the central body has nothing or little to do with the people directly, but is selected by, and communicates with, the governments of the various provinces. In fact, we have ceased to apply the terms "federal" and "federation" to such a system. The resolutions of this central body can scarcely be regarded as legislation, because it lacks the administrative

Federation and  
Confederation.

\* Dicey includes locality in the first condition.

power to render them operative. The loose form of union in Germany between the years 1815 and 1870 is an example of the Staatenbund. The Federal Diet in that instance had little or no authority, apart from that acquired for it through the personal influence of its most prominent member—Metternich. The Confederation of the United States in its earlier form, and the Australian pseudo-confederation established under the Federal Council Act of 1885, were of similar nature. The main defect of such a system is, of course, the utter impotence of the central body to enforce its decisions, or to prevent the secession of any of its members who find the acts of the Federal body in any way distasteful. It was the anticipation of such a disastrous termination to American Confederation that caused Washington to make an urgent appeal to the States to amend and strengthen their national Constitution, and thus preserve the Union intact. \*

In the second class of federal systems, the national body—using the term “national” † to refer to the Federated States as a whole—may have very complete and far-reaching powers, enabling it to legislate and to administer its own laws, and within certain limits to be independent of State control; whilst the

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\* *Vide Chapter XII.*

† Throughout, the terms “national” and “central” are used interchangeably with the term “federal.”

States, shorn of the powers which are transferred to the Federal Government, are to that extent restricted in their sovereignty. Moreover, the Federal lawmakers and administrators receive their office, not from the State Governments, but directly from the people—though, as will be shown later, a proportion of the representatives are commissioned to safeguard State interests. Such a system is called a *Federation* or *Bundesstaat*. The United States, since 1789, Germany since 1871, Switzerland, the Dominion of Canada, and the Commonwealth of Australia, are examples of this type.

It will be noticed that the people of Federated States are in the peculiar position of owing allegiance to two sovereigns. As citizens of a State they must submit themselves to the laws of the State and render the dues demanded by the State; as citizens of the Federation they are similarly subject to the demands of the National Government. "Each citizen has a double citizenship and a double allegiance; his political rights and duties fall into two bundles, the one referable to his particular State, the other to a Nation."\*

A federation of States differs from a league A Federation and of independent States, in that the former necessitates the establishment of a central government invested with sovereign legislative

\* Garran, "The Coming Commonwealth," p. 18.

and administrative powers, of which the States cannot deprive it; whilst the latter is impotent to carry out the collective will against the individual will of any of the States, inasmuch as its existence is based on a continued mutual sanction of the States, any of which may secede from it at will. In other words, the authority of the league exists solely and entirely on the sufferance of the members constituting it. A federation also differs from a "unification" of States, since in the latter the sovereign authority is exercised solely by the central body, the States having surrendered theirs at the time of union, and thereby lost their political individuality. As States, they are extinguished. Any powers exercised by them must be first delegated to them by the central body, which may also withdraw those powers at will. The States would thus be very much in the position of magnified shires with councils, whatever powers or activities they possessed being due to a higher authority, and liable to withdrawal or cancellation at any time. The Union of South Africa is an instance of this type.

#### Federation and Unification.

#### Advantages of Federalism.

As a system of government, federalism carries with it certain advantages and disadvantages, some of which are peculiar to itself. Yet, as we have already shown, its suitability or otherwise for any country depends entirely upon the conditions prevailing

in that country, and the general disposition of the inhabitants towards it. The general advantages may be briefly summarised as follows:—

(1) For large areas, federalism is preferable to a more highly centralised form of government; the latter, if not unworkable, is at least inexpedient. The former is the best means of developing a new and extensive country with some interests common to all its parts, yet with local conditions so diverse as to necessitate separate treatment. "It allows for the adjustment of legislation to local requirements, where unification might aim at a disastrous uniformity of legislation for States under vastly different conditions." "The loose structure of a Federal Government, and the scope it gives for diversities of legislation in different parts of a country, may avert sources of discord or prevent local discord from growing into a content of national magnitude.\*

(2) It is also preferable to the existence of independent States side by side, where this would be a menace to internal peace and economic progress, and an invitation to foreign attack. Federation is for such States a possible form of Union. Local provincial prejudices may render unification an impossible solution. Common interests and a

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\* Bryce, "American Commonwealth," I., p. 349.

common danger render complete separation inconvenient and dangerous. Federation is thus a means of reconciling the opposing forces of centralisation and localisation (or provincialism) by leaving room for local patriotisms whilst satisfying the yearnings for a larger national life. It remedies the narrowness of outlook of provincialism, yet avoids the possibility of a despotic central government.

(3) Federalism allows of provincial government, which, being closer at hand, and perhaps more immediately under the public eye than the central government, is a greater factor towards the development of popular interest in civic matters. The political education of the people is thus more thoroughly effected "Where other things are equal, the more power given to the units which compose the nation, be they large or small, and the less to the nation as a whole, and to its central authority, so much the fuller will be the liberties and so much greater the energy of the individuals who compose the people." Each citizen has a relatively greater stake and share, and consequently a greater interest in the issues before the country.

(4) The central government in a Federation, as compared with that where Unification has been effected, is less likely to break down by reason of the weight of its functions. The provincial bodies necessarily relieve it of a

great deal of the legislative and administrative burdens. Without the assistance of State machinery, the central parliament and government would be more liable to break down by reason of the great mass of questions demanding attention, and allow the national business to get into hopeless arrears.

(5) Bryce also suggests that Federalism allows of experiments in legislation and administration which could not safely be made in a large unified country. Just as a vessel with a number of water-tight compartments still remains buoyant after one of the compartments is injured, so the Federal ship of State remains afloat even though some political experiment has brought disaster to one of the States. The risk is confined to one State, and the damage perhaps more remediable than under a unified system.

On the other hand, federal systems are not without certain drawbacks. The liability to secession, for instance, would be greater where a State retained sufficient independence and individuality to make it resentful as a State. Yet the influence of the American Civil War must not be overlooked in this connection. As a result of that struggle it is now almost universally accepted as a definite federal understanding that a State is not free to withdraw at will from a Federal Union. The Common-

Disadvantages of  
Federalism.

wealth is constitutionally perpetual and indissoluble.

Further, federalism is likely to result in State "cliquism." There may be a tendency for States with kindred interests to combine in order to frustrate the will of the remaining States, whose interests are opposed to theirs. Should the interests of the larger States, for example, conflict with those of the smaller, the latter would probably go to the wall. This defect, however, may be anticipated by the adoption of the bicameral system of Legislature, in which one of the Houses may be so constituted that all the States are equally represented, and so are on an equal footing.

It is held by some that federalism often prevents a uniformity among the States in legislation or administration in many matters where it is urgently required. Perhaps the answer to this objection would be that such a disadvantage can be obviated by deciding what powers should be handed over to the central government and what retained by the States, or by providing means for constitutional amendment, which may be utilised whenever necessity demands it.

Federalism, it is contended, involves expense, delay and trouble, because of the double system of legislation and administration. This duplication of machinery, however, is perhaps an advantage in that greater efficiency results.

"Smoothness of working is secured by elaboration of device." \*

The objection is raised that federation is an unstable form of government. The influences at work are either pulling towards unification or complete separation. This argument, however, is scarcely supported by facts. The solidarity of the present-day federal systems suggests that the want of stability is apparent rather than real; and after the disappearance of the initial friction and irritation often evident during the early period of adjustment to new conditions, there is usually every promise of long continuance of the federal bond. The great Federations of America and Europe seem more firmly established to-day than at the time of their inauguration. Yet, of course, even these are young, and time alone will prove their permanence.

As already observed, the federal form of government is more complicated than other systems, as it seeks to retain the sovereignty for the States in matters of provincial interest, and establish a national sovereignty in matters of a national significance. The compromise must be so effected as to avoid a collision of powers. Friction will result if the balance is not finely and carefully

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\* Bryce, "The American Commonwealth."

adjusted. The situation is now generally met by defining and thus limiting the powers of either the State or the Federal Government, leaving the powers of the other indefinite and, except for the reserved powers, unlimited. It may be that certain powers are definitely assigned to the national government, and all the undefined questions left to provincial control; or *vice versa*, the State's powers may be enumerated and the indefinite residue vested in the central body. The United States Constitution is an example of the former type, that of Canada an example of the latter. Australia has in this particular followed on the lines laid down by the United States.

A Written Constitution Essential. Seeing, then, that one of the essential features of a federal system is the distribution of powers between the provincial and national bodies, a written Constitution is necessary in order to indicate in clear and unmistakable terms exactly what division of powers has been agreed upon. A written document is something definite to refer to, and a safeguard of the rights of both State and Commonwealth. Without it there would be constant encroachments of the activities of the one body on the rights of the other. Custom and tradition would form a very uncertain and unsatisfactory arbiter. But with a written law binding both State and Nation, the risk of friction is minimised. Should the Federal Parliament

legislate on any matter that is a purely State concern, the Act is constitutionally invalid. And similarly, State legislation encroaching on the Federal domain does not hold good. The Constitution therefore is, and must be, supreme, so that there may be certainty as to where the State and the Nation stand relatively to one another, and so that the State powers may be placed beyond the control of or seizure by the Federation, and the Federal powers protected against resumption by the States. In other words, the Constitution is above the National and the State Legislatures.

But if the Constitution is to remain supreme, and the distribution of powers between Nation and States, is fixed by it, the logical effect is that an "interpretative" body must be created to decide whether an Act infringes the Constitution or not. Without such a body, legislation might be inconsistent with the Constitution, and yet be operative because no one was empowered to declare its invalidity. Without it, it is quite conceivable that the Federal Government may exceed its Constitutional rights and trespass on State ground. The sovereignty of the State may be endangered, and both the "rigidity" of the Constitution and the Federal character of the union in jeopardy. With an encroaching Federal Parliament, in the absence of an interpretative body, the Constitution would

practically be rendered "flexible" \* and unification might easily result. There must be

**The Interpretation of the Constitution.** "a guardian of the Constitution" since "the legal supremacy of the Constitution is essential to the existence of the State." The Federal Convention which met at Philadelphia in 1787, was the first to hit upon the device of constituting the Federal Supreme Court Judges the "guardian," and its example has been followed by Canada and Australia. In these countries the Federal Court can be appealed to as the "final interpreter of the Constitution," and can decide whether a law proposed by the Federal Parliament encroaches on the rights of the State Legislatures and *vice versa*. This is generally done indirectly. Bills that have been passed successfully through all the legislating processes are not necessarily referred to the judges of the Federal Court, but, as in the United States, if a case is brought before them, it may be that in arriving at some decision on that case they may have to express their views on the validity or otherwise of the Federal Act.

**Provision for Amendment.**

Again, if the Constitution is supreme, a natural question to ask is, "How can it be changed whenever it is discovered to be defective in any particular?" In England, though one speaks of "the Constitution" and

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\* For the use of the terms "flexible" and "rigid" see pages 119 and 120.

of "fundamental laws," there is neither one nor the other in the sense in which the people of a Federation understand the terms. If any of the so-called fundamental laws of England are distasteful or unsatisfactory, the British Parliament can remove them by the simple ordinary legislative process. It would rescind the law or pass another in the usual way. For example, it may be regarded as a fundamental law that England should be governed by a King and two Houses of Parliament. If the Parliament, however, were to agree by the ordinary methods to abolish one House, the original arrangement is set aside at once. In other words, Parliament controls the Constitution. Such a Constitution is said to be "flexible," because it is alterable without re-course to any extraordinary procedure. *Flexible and Rigid Constitutions.*

Flexible Constitutions are possible, however, only where complete political unity or unification exists. But in Australia, the United States and the other Federal countries, the Constitution is above simple Parliamentary interference, and controls the Parliament. Any measure which violates the Constitution is invalid, even though it has proceeded through all the stages of an ordinary bill. If it were allowed the Federal Parliament to amend the Constitution when it so desired, the States would be at its mercy. On the other hand, it is clearly inconceivable to allow the State

Parliament to amend it, since the Federal Parliament would be deprived of its sovereignty. The system would be of the nature of a weak Staatenbund or Confederation. "A Federal Constitution is in one aspect a compact between certain high contracting parties in the States and the Nation; and such a compact would lack stability if one of the parties could alter it at will."

Yet it is evident that a Constitution cannot remain unaltered for ever. Unless provision be made for its amendment, the Constitution may clog the wheels of progress, and result in the accumulation of a strong force of discontent which, when it does break out, may carry with it to total destruction the whole fabric of the Federal system. The difficulty is surmounted by placing an amending power jointly in the hands of the people and the Federal Parliament, or by requiring unusual majorities in the Legislatures, or by the assembling of special constituent conventions representing both State and National interests, or by some such extraordinary procedure. This safeguard against ill-considered amendment renders the Constitution "rigid"—a term which signifies that some extraordinary authority is required before a change can be effected. Thus, though we have spoken of a double sovereignty—that of the States, and that of the Nation—yet we can regard neither

as sovereign in an absolute sense. Parliamentary sovereignty is limited by and subject to the Federal Constitution, and the force or amending power behind the Constitution is the real sovereign. In the United States the real sovereign is three-fourths of the Legislatures of the States; in Australia it is the people taken collectively and as States, together with the Federal Parliament acting under special conditions.\*

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\* *Vide infra*, Chapter IX.

## CHAPTER VI.

### THE FEDERAL MOVEMENT IN AUSTRALIA.

The origin of the  
Federal Move-  
ment—Deas  
Thomson.

The federal movement in Australia owes its origin in part to a failure in 1842 to establish reciprocal freetrade conditions between the colonies of New South Wales, New Zealand and Van Diemen's Land. The Legislature of the parent colony purposed admitting the produce and manufactures of the other two colonies free of duty. The Secretary for the Colonies, however, refused to allow the proposed Act on the ground that British policy prohibited the colonies setting up differential duties, as they led to retaliation and protection. Curiously enough, the effect of this disallowance seemed to be to render tariff warfare between the colonies inevitable; the duties already imposed would tend to become heavier and so revenue tariffs to develop into protective tariffs. Fear of this led Deas Thomson, Colonial Secretary in New South Wales, to make the first suggestion of a federal union of the Australian colonies. Speaking through Governor Fitzroy, in 1846, he recom-

mended the appointment of "some superior functionary" to whom could be submitted all measures passed by the various colonial Legislatures affecting intercolonial trade or the general interests of either England or Australia as a whole. To Deas Thomson, therefore, belongs the honour of having originated the federal movement. "In his fertile brain the idea first germinated, and to him Australia is indebted for its first recorded expression. He is *par excellence* the Father of Australian Federation."\*

Acting on the suggestion, Earl Grey,<sup>Earl Grey's Advocacy.</sup> Secretary of State for the Colonies, when foreshadowing the separation of the Port Phillip district from New South Wales, made out a case for some sort of union between the colonies. "There are questions," the Minister affirmed, "which, though local as it respects the British possessions of Australia collectively, are not merely local as it respects any one of these possessions. Considered as members of the same Empire, those colonies have many common interests, the regulation of which, in some uniform manner and by some single authority, may be essential to the welfare of them all. Yet in some cases such interests may be more promptly, effectively and satisfactorily decided by some authority

\* Allin, "Early Federation Movement of Australia," p. 55.

within Australia itself, than by the more remote, the less accessive, and in truth the less competent authority of Parliament."\* It might be arranged, he added, that the colonies should co-operate in matters affecting their common interests, such as import and export duties, conveyance of letters and intercolonial roads and railways. The colonists, however, not having been consulted, regarded the Earl's constitutional suggestions as a piece of unwarranted interference on his part. Indignation meetings were the order of the day, even though the idea of a common congress was not unpopular.

Recommendations  
by the Committee  
for Trade and  
Plantations.

The question was next given serious consideration by the Committee of the Privy Council for Trade and Plantations, to whose deliberations Australia's constitutional problem had been submitted. The Committee realised the necessity for uniformity in the matter of customs duties and for the abolition of border duties between the colonies, and thought that the danger of tariff warfare would be obviated by federation. It therefore recommended that one of the Governors should be constituted the Governor-General of Australia; that he should have power to convene a General Assembly (consisting of a single House of Delegates) but that the first convo-

\* Quoted by Egerton, "Federations and Unions in the British Empire," p. 41.

cation should be postponed until two or more of the local Legislatures requested him to summon it; and that the Delegates should be chosen by the various Legislatures, each colony sending two members at least, with an additional member for every 15,000 inhabitants. The last-mentioned arrangement was inserted with a view to giving New South Wales twelve members, and Victoria, South Australia, and Van Diemen's Land thirteen between them, whereas strictly proportional representation would have enabled the Mother Colony to outvote the other three colonies combined. It was suggested that the General Assembly should be empowered to impose duties, to legislate on such matters as letter conveyance, intercolonial roads and railways, shipping dues, lighthouses, weights and measures, and any other matter referred to them by the local Parliaments, and to raise funds by taking a percentage of the revenues of the various colonies. The question of military and naval defence was not mentioned. A General Supreme Court was to have power to hear appeals from the provincial courts.\*

As the result of the Committee's report, clauses of a federal nature were introduced into the Bill of 1850 dealing with Australian

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\* *Vide Egerton's "Federations and Unions within the British Empire," pp. 169-184.*

Constitutions. A powerful opposition, however, effected their removal, and henceforth it was felt "that a satisfactory scheme of Australian Union must be worked out in Australia, not in England."\*

**Earl Grey's  
Federal Clauses.**

Earl Grey, however, could not entirely abandon the federal idea. The Governor of New South Wales (Sir Charles Fitzroy) was not only appointed Governor-General of the whole of Australia, but received four separate commissions as Governor of each of the colonies of New South Wales, Victoria, Van Diemen's Land and South Australia. The virtual Governors of the latter three colonies had to content themselves with the nominal title of Lieutenant-Governor. The Governor-General was instructed not to interfere with his subordinates' local control, though he might act in matters of general concern, and even supersede a Lieutenant-Governor when on a visit to his colony. This system obtained for about five years, but was abandoned in 1856, when full gubernatorial rank was given to His Majesty's representative in each of the colonies. The title of Governor-General was maintained for another five years, but lapsed at the close of Sir William Denison's administration in 1861. Earl Grey's attempt to impose a federal system on the Australian Colonies

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\* Quick and Garran, "Annotated Constitution of the Australian Commonwealth," p. 82.

had failed mainly because the movement had not emanated from the colonists. Yet he is to be credited with having for the first time attempted to lay down the practical details of a federal system. Henceforth, suggestions of a federal nature were to come from the colonial statesman, and the British Government was to play the laggard. In accordance with the Wentworth and Act of 1850 entrusting the Colonial Legislatures with the power of amending their own Constitutions, a Committee of the New South Wales Council drew up a Draft Constitution in 1853, and, on the proposal of Wentworth, asserted the necessity for a General Assembly to deal with Intercolonial matters, such as tariffs and postal arrangements. Wentworth, however, did not go so far as Dr. Lang, whose more comprehensive and somewhat American scheme he ridiculed, for to Lang "a Federated Australia and a Republican Australia seemed practically coincident ideas." Lang's influence was impaired by a wide-spread suspicion of his leaning towards separation from England. Wentworth, on the other hand, was an Imperialist, and in order to dissociate himself from Lang's scheme, advocated a loose confederate system rather than a thorough federation.\* The question was kept to the front by Lang, as well as by Deas

\* *Vide Allin, "Early Federation Movement of Australia."*

**Rev. John West.** Thomson and the Rev. John West, the latter of whom, under the *nom de plume* of John Adams, contributed articles to the *Sydney Morning Herald*,\* in one of which he declared "centripetal and centrifugal forces are perpetually operating to prevent the undue separation or mischievous contiguity of its various parts and powers." Wentworth, too, who had gone to England in connection with the question of the colony's Constitution in 1857, presented, with the assistance of the "General Association for the Australian Colonies," a memorial on the question to Labouchère, the new Secretary for the Colonies. The Association even went so far as to draw up a Draft Bill, suggesting the powers that should be conferred on the Federal Assembly. One weakness in the scheme was that the Federal Assembly was to be dependent for its funds on the goodwill of the Colonial Legislatures. The Minister refused to further its cause on the ground that there was no general demand amongst the colonies themselves for federation. Labouchère's attitude was in direct contrast to that adopted by Earl Grey.

**Unification proposed.** In view of the plea that is sometimes made for the Unification of the Australian States, it is of interest to find that the first suggestion of a Unified Australia dates as early as 1853,

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\* Several Articles between January 30 and September 1, 1854.

when the residents of the Shoalhaven district presented a petition for a conference of the Governor-General and the Lieutenant-Governors, together with other delegates, to prepare a single Constitution for Australia. Its acceptance, they argued, would put an end to the incongruity of four Constitutions for adjacent peoples of the same race and allegiance. However, the Shoalhaven district was a voice crying in the wilderness, and the petition was unsupported. Besides, Unification had already\* proved to be impracticable,\* mainly because of the imperfect development of the means of communication.

Meanwhile, the Victorians had voiced their Victoria—views through their Constitutional Committee, Gavan Duffy, of which Charles Gavan Duffy was the most vigorous member. The Committee declared that "Neighbouring States invariably become confederates or enemies. By becoming confederates so early in their career, the Australian colonies would, we believe, immensely economise their strength and resources. They would substitute a common national interest for local and conflicting interests, and waste no time in barren rivalry. They would enhance the national credit, and attain much earlier the power of undertaking works of serious cost and importance. They would not only save time and money, but

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\* *i.e.*, before 1851.

attain increased vigour and accuracy by treating the larger questions of public policy at one time and place."\*

The Victorian Committee recommended a conference of three representatives from each Colonial Legislature. The suggestion was favourably received in New South Wales by Deas Thomson's Select Committee, which in 1857 asserted that further delay would increase the danger of antagonism and jealousy. South Australia and Tasmania even went so far as to appoint delegates ready in the event of the conference being held. But Ministerial changes in New South Wales led to the indefinite postponement of the question. Duffy persevered in Victoria with other Select Committees, and urged for the first time the necessity of union for defence purposes. Provincialism, however, seems to have been the obstacle to federation in the earlier as well as in the later stages of the movement. New South Wales was evidently jealous of her prestige, whilst Victoria and, after 1859, Queensland, were enjoying too keenly the sweets of independence to allow of the Federal proposal being seriously entertained.

Attempts at Inter-colonial understandings. It was now felt that, if complete federation was impracticable, at least one of the objects of a federal union—the adoption of a uniform

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\* Sir Henry Parkes, "Fifty Years in the Making of Australian History," pp. 581-2.

tariff—should receive serious attention. For that purpose several intercolonial conferences were held between 1855 and 1873. As a result of these, New South Wales, Victoria and South Australia agreed, at one time, to make the Murray River trade free, at another time that the Mother Colony should receive from Victoria a fixed money compensation for revenue lost by this free trade. No permanent agreement on the rivers question was arrived at. On the whole, the purpose of the conferences remained unachieved, partly because the Imperial Government would not hear of differential rates being established in the colonies, and partly because the tariff policies of Victoria and the other colonies (more particularly that of Victoria with that of New South Wales) were irreconcilable. The objection of the Home Government to differential rates had, however, the effect of producing a protest in 1871 from the Colonial Legislatures against further Imperial interference with their fiscal policies. The protest was repeated by the Conference of 1873, convened by Sir Henry Parkes, which also expressed itself in favour of a Customs Union for the purpose of levying revenue tariffs. These protests led to an Imperial Act allowing reciprocity between the colonies, a right that was long clamoured for, and when obtained—never used.

Sir Henry Parkes and Confederation as defence, lighthouses and oversea postage,

was also aimed at by means of intercolonial conferences. It was during one such conference that Mr. (afterwards Sir) Henry Parkes first advocated, in 1867, the formation of a Federal Council, or, in other words, a loose form of Confederate Union. In support of his proposal, he argued that "there are questions projecting themselves upon our attention which cannot be satisfactorily dealt with by any one of the individual Governments." A proposal for the establishment of such a Council immediately afterwards passed the New South Wales Legislature, but was shelved by the Home Government.

The conferences just referred to did not seriously consider the question of federation itself—except for Parkes' confederate proposal—and more than a decade had elapsed when the question was again broached by Duffy in 1870. Stimulated perhaps by the federal settlement in Canada, a Royal Commission enquired into the arguments for a similar development in Australia, but ended in putting forward extravagant claims, such as Australia's right to remain neutral when Britain was at war and to conclude treaties with foreign powers. No progress was made, and another lapse of ten years followed, after which representatives from New South Wales, Victoria

and South Australia meeting in 1881, first in Melbourne and later in Sydney, again considered at the instigation of Sir Henry Parkes the desirability of creating a Federal Council, constituted of an equal number of representatives from each colony. Sir Henry addressed Proposals by a memorandum to the Conference in which he Parkes, declared:—

- (1) "That the time *is not* come for the construction of a Federal Constitution, with an Australian Federal Parliament.
- (2) "That the time *is* come when a number of matters of much concern to all the colonies might be dealt with more effectively by some federal authority than by the colonies separately.
- (3) "That an organisation which would lead men to think in the direction of federation, and accustom the public mind to federal ideas, would be the best preparation for the foundation of Federal Government."\*

The Federal Council was, according to his scheme, to have partly administrative and partly legislative functions. As, however, neither freetrade New South Wales nor protectionist Victoria could agree to sink their fiscal differences, the suggestion of a Federal Council once again proved abortive.

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\* Sir Henry Parkes, "Fifty Years in the Making of Australian History," p. 584.

External pressure, in the shape of foreign complications, was now to influence public opinion towards a more favourable view of Federation. The transportation of French criminals to New Caledonia, whence migration to Australia was easy, the activity of Germany in New Guinea, together with the apathy of the British Government towards the representations of a single colony—Queensland—on the question of annexation in New Guinea, convinced several that federation was an urgent and practical question. Accordingly, at a further conference in 1883 the six colonies of Australia, together with New Zealand and Fiji, were represented. Mr. (afterwards Sir) Samuel Griffith, who now entered prominently into the movement, submitted a resolution which, after discussion and modification, resulted in the establishment of a Federal Council. It met for the first time in February, 1886, and consisted of two representatives from each of the three colonies—Victoria, Queensland and Tasmania, and one each from Western Australia and Fiji.\* Fiji dropped out after the first session; South Australia entered temporarily, between 1888 and 1890; but neither New South Wales nor New Zealand had any share in it. The aloofness of the mother colony was due to the opposition of

The Federal  
Council.

New South Wales  
stands aloof.

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\* Fiji and Western Australia were entitled, by the Federal Council of Australasia Act of 1885, to two representatives each.

Sir John Robertson, and especially of Sir Henry Parkes, who had changed his views as to the value of such a Federal Council. "In one of my tentative endeavours," he afterwards wrote, "I committed the error of suggesting the scheme of the Federal Council which is now dragging out a consumptive existence under an enabling Act of the Imperial Parliament."\* He had come to realise that such a confederacy was impracticable, would soon break down, cover Australia with ridicule, and "impede the way for a sure and solid federation." Moreover, the absence of executive authority rendered the power to legislate of little value, even though this power extended to such matters as Australia's relations with the Pacific Islands, the prevention of the influx of criminals, quarantine, certain aspects of maritime defence, and any question referred to it by the local Legislatures. The Council met periodically for fourteen years, but made its influence but little felt, and finally its "consumptive existence" came to an end in 1899 on the eve of the consummation of the greater and more complete union.

In 1889 the awakening of a widespread interest in the defence question of Australia led to an increased anxiety for common action in military and naval matters. The revival

The Revival of  
the Federal Ques-  
tion.

\* Sir Henry Parkes, "Fifty Years in the Making of Australian History," p. 583.

was due to a report on our defence system by Major-General Bevan Edwards, in which the writer recommended the federation of the forces of the colonies, a uniform system of organisation and armament, the establishment of a military college, and a uniform gauge for railways. Sir Henry Parkes, realising the opportuneness of the moment for resurrecting the federal question—for he rightly opined that it could be borne forward to complete realisation only on the crest of a wave of popular enthusiasm—induced the Governments of every colony to give it their consideration once again. At a small conference held in Melbourne early in 1890, Mr. James Service, of Victoria, declared the necessity for slaying “the lion in the path”—the tariff problem—whilst Sir Henry Parkes in an inspired moment gave utterance to the now historic expression, “The crimson thread of kinship runs through us all.” A general motion favouring an early union under the Crown was passed, and a recommendation for a more representative convention agreed upon. Meantime, New South Wales and New Zealand steadily resisted every invitation to join the Federal Council already existing.

The Australasian  
National Conven-  
tion of 1891.

A Convention of forty-five delegates (seven from each Australian colony and three from New Zealand) met in Sydney in 1891 under the presidency of Sir Henry Parkes, who was

now rightly regarded as the undoubted leader of the movement. The Convention proceeded with considerable skill and success to draft a Constitution." The fundamental principles of union laid down were—intercolonial freetrade, a federal tariff, federal defence, and the reservation of provincial rights in provincial matters; whilst the essential features of the proposed national machinery were—a complete national government with legislative, judicial and executive departments; a Legislature of two chambers representing respectively the States and the Nation; and a system of responsible government.\* These principles and features were adhered to in the draft. The danger of a break-down on the tariff question was overcome for the time by a general acceptance of Sir Henry Parkes' view that the fiscal question must be left absolutely to the federated people of Australia speaking through their Parliament. The question of representation caused some discussion, as some of the smaller States claimed equal representation in both the Senate and the House of Representatives. However, the usual compromise between the two principles of State equality and proportional representation was agreed to, the Senate to be based on the former principle, and constituted of an equal number of

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\* Quick and Garran, "Annotated Constitution of the Australian Commonwealth," p. 126.

Senators from each State, whilst the latter principle was to form the foundation of the House of Representatives, the number of members from the States varying in proportion to their population.

The fact that the Draft Bill of 1891 underwent considerable modifications in the later Conventions of 1897-8\* must not be allowed to obscure the fact that our indebtedness to the 1891 Convention is almost immeasurable. Federation ceased to be a "misty abstraction," and became a definite and practical policy. "In spite of imperfections, the first draft stands as a convincing monument of the wisdom, the statesmanlike ability, and the patriotism of its framers. In those few days they laid down the main lines from which the movement has never since wavered."†

The Convention recommended the various State Parliaments to arrange for the submission of the proposed Constitution to a referendum, and, upon its adoption by three colonies, to request the Imperial Government to arrange for its establishment.

The Question again Shelved.

Sir Henry Parkes duly introduced the question into the New South Wales Assembly, but no real progress was made. The attack on the Bill was led by Mr. (afterwards Sir)

\* *Vide infra*, pp. 149-152.

† Quick and Garran, "Annotated Constitution of the Australian Commonwealth," p. 136.

G. H. Reid, who, though not opposed to federation as a general policy, was concerned about the fate of the freetrade system of New South Wales. He also declared that the power of the Senate was excessive, and the principles of responsible government were not sufficiently guaranteed. This attack, together with the retirement of the Parkes Ministry, the general financial depression of the early nineties, and the languor with which Parliament addressed itself to the question, foreshadowed the defeat of the movement, and the discussion eventually lapsed. Consequently the other colonies, who were not prepared to move without New South Wales, also shelved the question.

## CHAPTER VII.

### THE FEDERAL MOVEMENT IN AUSTRALIA (Continued).

#### FEDERATION REALISED.

The Movement  
Popularised.

The failure of 1891 was to be but the prelude to complete success. The federal question was fast taking hold of the popular mind, and Sir Henry Parkes, in 1892, suggested that the most effective policy would be to let the people themselves elect the next convention either to revise the old or draft a new Bill. "Every mind in Australia," wrote the ex-Premier, "has been familiarised with the idea of a united people."\*

With the awakening of popular enthusiasm and the crystallisation of a definite public opinion on the question, a successful issue to the movement was inevitable.

So flows beneath our good and ill  
A viewless stream of Common Will,  
A gathering force, a present might,  
That from its silent depths of gloom  
At Wisdom's will shall leap to light,  
And hide our barren feuds in bloom,  
Till, all our sundering lines with love o'ergrown,  
Our bounds shall be the girdling seas alone.†

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\* Sir Henry Parkes, "Fifty Years in the Making of Australian History," p. 599.

† James Brunton Stephens, *The Dominion of Australia*.

The activity of the Australian Natives' Association in Victoria, the creation of non-party federation leagues in various centres, culminating in the establishment of a general "Australian Federation League" in each colony, and the holding of a non-parliamentary conference at Corowa in August, 1893, were the outward manifestations of the growing popularity of the federal idea. On the motion of Dr. Quick, of Victoria, the Corowa Conference adopted the very important resolution that the various local Legislatures should make provision for the election by the people themselves of representatives to a convention which should draft a Bill, and that this proposed Constitution should then be submitted to a referendum. Henceforth the movement was to be emphatically democratic.

With the Corowa resolution, and the accession of the Reid Ministry to office in 1894, the last and most important stage of the struggle was reached. The new Premier adopted a more sanguine attitude towards the question. He declared his sympathy with the idea of a popularly elected Convention and a Premiers' Conference, 1895. As a preliminary step he secured a conference of Premiers at Hobart in January, 1895. It was there resolved that a convention consisting of ten representatives from each colony should draft the details of the proposed federal

scheme, but that it should take into consideration amendments suggested by the local Legislatures; that the proposed Constitution should be submitted to a referendum, after which, if accepted, it should be sent to England for enactment by the Imperial Parliament. The New South Wales Parliament passed the requisite "Enabling Bill," arranging for both the election of representatives and the referendum, and the other colonies—Queensland, for the time, excepted—quickly followed her example.\*

The magic wand had been waved; the people were to be consulted, and the end was in sight. The public interest in the question was now most keen, and a "People's Federal Convention," consisting of invited delegates from various organisations, which met at Bathurst in November, 1896, served the purpose of stimulating a wide public discus-

The Election of sion and educating the people. Four months Convention Dele- later keenly contested elections of representa- gatates.

gates to the Statutory Convention took place in four colonies. Nearly fifty candidates in New South Wales alone submitted themselves to the popular vote. Mr. (now Sir) Edmund Barton easily headed the list with the handsome poll of nearly 100,000 votes, and became the virtual leader of the Convention. The interest in the other colonies was scarcely less

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\* In Western Australia Parliament elected the delegates.

keen; but in Western Australia the delegates were not chosen by the people, but by a joint sitting of the two Houses of Parliament.

The Convention had sessions in Adelaide, Sydney and Melbourne respectively (1897-8). At the first session the principles of federation as laid down in 1891 were agreed to, and it was further declared that another purpose of federation was "to enlarge the powers of self-government of the people of Australia." A draft Bill, resembling the 1891 Bill in its general features, but with important modifications and additions, was agreed to. The tariff question caused no trouble, as that "lion in the path" had been slain by the suggestion of Sir Henry Parkes in 1891 to the effect that the problem was one for federated Australia to solve. The following were amongst the most important determinations: the Senate or States' Assembly was to be elected directly by the people instead of by the State Legislatures; the House of Representatives, elected on a population basis, was to be numerically twice as strong as the Senate: whilst responsible government was specifically provided for by a clause requiring that Ministers should not hold office for more than three months without a seat in Parliament. Proposed amendments of the Constitution were to be passed by both Houses of Legislature in the first instance, and then to

receive the direct sanction of the people before they could take effect.

**Opposition in New South Wales.** Between the first and second sessions the proposals were referred to the Colonial Parliaments, and a strong opposition was at once evident in New South Wales, though all the other colonies were more favourably disposed towards them. Differences of opinion between the larger and smaller States on the question of the representation in the Senate were again prominent, the bone of contention being the same as in 1891. The large States wanted Senate representation on a population basis, the smaller States plumped for State equality, with increased powers for the Senate in the matter of money bills.

**The Sydney Session.** The second session of the Convention commenced in September, 1897, Queensland being still unrepresented. The members were faced with nearly 300 amendments sent forward by the State Legislatures, referring to the various clashing interests of the States. The main problems had to do with—

1. the system of representation in the Senate;
2. the Senate's powers over money bills;
3. the financial arrangements between the States and the proposed Commonwealth;
4. Provisions against deadlocks;
5. the control of navigable rivers.

Eventually it was decided that the principle

of State equality should be adhered to for the Senate; deadlocks should be overcome by a dissolution of the two Houses, followed, if necessary, by a joint sitting, at which, however, a three-fifths majority should be necessary to secure the passage of a measure.

In the final session at Melbourne (January to March, 1898) the financial problem was thrashed out and Sir Edward Braddon secured the passage of a clause—popularly known as the “Braddon blot”—providing for the return of three-fourths of the net revenue from Customs and Excise to the States. It was expected that this provision would prevent any serious disturbance of the States’ revenues. The question of the control of navigable rivers gave the Convention considerable difficulty, as South Australia wanted it handed over to the Federal Parliament, whereas New South Wales considered that her scheme of irrigation and water conservation would be endangered if she lost control of her own rivers. A compromise was eventually effected. Navigation was to be a matter for federal control, but this control was not to abridge the rights of a State or its people to “reasonable use” of river waters for conservation and irrigation. No attempt was made to define the term “reasonable use.”

The recognition of the Deity by the insertion in the Constitution of the phrase “humbly

The Melbourne Session.

relying upon the blessing of Almighty God " having been determined upon, the deliberations of the Convention were brought to a close. Mr. Kingston of South Australia, speaking from the chair, voiced the general feeling of satisfaction and expectation when he declared the Bill to be "the most magnificent Constitution into which the chosen representatives of a free and enlightened people have ever breathed the life of popular sentiment and national hope."

The Referendum  
of 1898.

The Constitution had now to be submitted to the vote of the people in four colonies, New South Wales, Victoria, Tasmania and South Australia. Western Australia awaited the result in these colonies before taking any action. New South Wales was the storm centre. Equal State representation in the Senate was still objected to, on the ground that the will of the majority would be overridden; the Labour Party demanded the referendum as a means of overcoming deadlocks; the provisions in the Braddon clause were regarded with horror, since they apparently necessitated immense customs revenue, and therefore involved increased taxation, especially in the freetrade colony of New South Wales; whilst there was considerable anxiety as to whether the federal capital was to be located in the mother colony. Consequently when Mr. Reid criticised the

Bill somewhat adversely and practically threw his influence on the side of the Anti-Billites, the fate of the Constitution became extremely problematical, despite the announcement of his intention to vote for its acceptance.

Victoria, having already adopted a protectionist policy, had no fear of increased taxation through Federal Customs. This colony was consequently much more favourably disposed to the Bill, and this inclination was increased by the influence of the Australian Natives' Association. The opposition forces were also weak in South Australia and Tasmania, though the former colony was dubious as to the cost of federation.

The referendum was taken on the 3rd June, 1898,\* and gave a majority in the four colonies in favour of the Bill, but in New South Wales the statutory number of votes—80,000—had not been recorded for acceptance, and consequently the measure was rejected. In the other colonies the declaration for the Bill was most emphatic. The actual poll was as follows:—

		For	Against
New South Wales ..		71,595	66,228
Victoria .. ..		100,520	22,099
South Australia ..		35,800	17,320
Tasmania .. ..		11,797	2,716
 Total .. ..		 219,712	 108,363

\* In South Australia, on the 4th June, 1898.

Mr. Reid seeks Amendments. The opposition in New South Wales was not so much to federation itself as to the particular Bill before the country, and as the federalists were not prepared to abandon the movement, it was clear that concessions must be made to the opponents in the shape of suitable alterations in the Bill. The chief amendments sought were (1) the removal of the three-fifths majority at the joint sitting of the two Houses in cases of deadlocks; (2) the expunging of the "Braddon blot;" and (3) the location of the federal capital in New South Wales. Mr. Reid, having been continued in power as the result of the general elections of 1898, immediately applied himself once again to the problem, and the Premiers met in conference in Melbourne in January, 1899. On this occasion Queensland was represented. The concessions required by New South Wales were practically granted. The substitution of an absolute majority for the three-fifths majority at joint sittings was agreed to. The operation of the Braddon clause was limited to ten years, and thereafter until Parliament made other provision. The capital was to be fixed in New South Wales, but not within a radius of 100 miles from Sydney, and, until the capital was established Melbourne was to be the seat of government.

Although the Draft Bill of 1891 is generally regarded as the basis of the Constitution that

was ultimately accepted in 1899, yet the original had in the meantime undergone very substantial modifications, and it is well at this stage to summarise the main points of difference between the two measures.

The following provisions had been made in the Bill of 1891:—

- (a) The State Legislatures were to elect the Senators, eight from each State, who were to be not less than thirty years of age and resident for at least five years in Australia.
- (b) Proposed constitutional amendments were to be ratified first by the Federal Parliament and then by State conventions which were to be elected as the Federal Parliament provided.
- (c) The suffrage for the election of Representatives was to be left to the control of the State Legislatures, which should also determine the electoral divisions.
- (d) Surplus federal revenue, after all federal expenditure had been provided for, was to be returned to the States in proportion to the amount raised within each.

No provision had been made in the earlier measure for deadlocks between the two Federal Houses; insurance, invalid and old age pensions, the treatment of alien races, and industrial dis-

putes had been omitted from the enumeration of the federal powers; and, there was no assurance that the system of responsible government would obtain, since it would be possible for the Executive to include Ministers who had no seat in Parliament. The Bill merely declared that the Executive officers should be capable of sitting as members in Parliament, the intention being, according to Sir Samuel Griffith who was answerable for the clause, that responsible government should be possible, but not necessary. Moreover, the establishment of a Federal Supreme Court was to be at the Federal Parliament's discretion.

It will easily be seen that the first and second of the above proposals were considerably less democratic than those eventually adopted. The people were to have a direct voice neither in the personnel of the Senate nor in the alteration of the Constitution.

In contrast to these proposals of the 1891 Bill, the Constitution of 1899 provided:—

- (a) That Senators should be elected by the people, the electors of a State acting as one constituency. The qualifications of a Senator were to be the same as those for a Member of the House of Representatives, *i.e.*, he must be twenty-one

years of age and resident within the Commonwealth for at least three years.

- (b) Proposed amendments of the Constitution were to be submitted to a referendum, and be ratified by a majority of voters in a majority of States, as well as by a majority of the aggregate voting.
- (c) The federal suffrage was to be a matter of federal control, though uniformity throughout the Commonwealth was to be observed.
- (d) The financial relations between the Commonwealth and the States were determined for ten years by the Braddon clause—which has already been explained—after which the Federal Parliament could make other arrangements.
- (e) Deadlocks were provided for by a double dissolution, and, as a last resort, by a joint sitting of the Houses.
- (f) The question of insurance, old age and invalid pensions, alien races, conciliation and arbitration of industrial disputes extending beyond the limits of one State, and railway construction and extension in a State with the consent of that State, were added to the Federal powers.
- (g) Responsible government was assured by requiring all Ministers to hold seats in Parliament.

(h) The Federal High Court was established by the Constitution, and its interpretation of the Constitution was to be final.\*

The Referendum  
of 1899.

The proposed Constitution was once again submitted to the people, and in New South Wales, by means of new appointments to the Legislative Council, the Enabling Act was modified in order to recognise the decision of a simple majority of the electors voting. When Mr. Reid expressed his adherence to the Bill its acceptance was assured. The referendum of the 20th June, 1899, resulted in a heavier poll and a decidedly increased majority in favour of the measure. South Australia had already given its decision (April), and Victoria and Tasmania reiterated their previous acceptance with a most emphatic poll. Three months later Queensland, largely influenced by the decision in New South Wales, also gave a respectable majority for the Bill. The actual polling was as follows:—

		For	Against
New South Wales	..	107,420	82,741
Victoria	..	152,653	9,805
South Australia	..	65,990	17,053
Tasmania	..	13,437	791
Queensland	..	38,488	30,996
Total	..	377,988	141,386

\* These details will be referred to again in the more systematic analysis of the Constitution (*vide* Chapters VIII. and IX.), but are mentioned here to indicate the progress made since 1891.

"These figures," write Quick and Garran, "are a striking proof of the extent and sincerity of the national sentiment throughout the whole of eastern Australia; and they are also a unique testimony to the high political capacity of the Australian people. Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood."\*

Western Australia now reconsidered the Western Australia Bill and asked for four amendments, the chief being an unrestricted power to impose inter-colonial customs duties for five years. Sir John Forrest put his views before the other Premiers, but it was felt that the acceptance of the Bill by five colonies precluded any further amendments.

A delegation of one Member from each colony, including Western Australia, and, at a later stage, New Zealand, proceeded to England to see the Bill through the Imperial Parliament. Mr. Barton was recognised as the leader of the delegation. The Secretary

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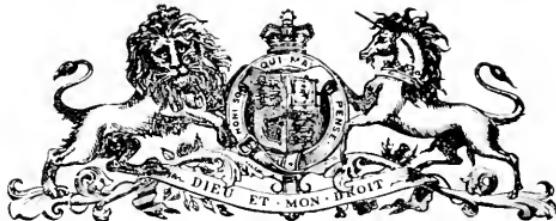
\* Quick and Garran, "Annotated Constitution of the Australian Commonwealth," p. 225.

of State for the Colonies was anxious to insert several amendments protecting Imperial interests, but the delegates insisted that the Bill should be passed in the form already accepted by the people of Australia. The Minister gave way on all points but the question of appeal to the Privy Council. He felt that the right of appeal should not be restricted, but that Her Majesty's subjects in the colonies should "feel that we offer them the finest court of ultimate appeal the Empire can produce."\* It was contended that the bonds uniting the two countries would thus be strengthened. Eventually the difficulty was overcome by allowing appeal from the High Court to the Queen in Council on constitutional questions only when the High Court of Australia should certify that the question was one which ought to be carried on to the Queen in Council, and that the Queen's prerogative to grant special appeal to Herself in Council should not be otherwise impaired. Any proposed law limiting the matters in which such leave should be granted was to be reserved for the Queen's assent. "The result, therefore, was a compromise. The long-expected general Court of Appeal was established; and the appeal to the Privy Council was retained under conditions which, whatever their demerits, respect local

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\* Haldane, in "*Juridical Review*," March, 1900.





# Commonwealth of Australia Gazette.

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TUESDAY, 1 JANUARY.

[1901.

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By the QUEEN.

## A PROCLAMATION.

VICTORIA R.

WHEREAS by an Act of Parliament passed in the Sixty-third and Sixty-fourth Years of Our Reign intituled, "An Act to constitute the Commonwealth of *Australia*," it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation, that, on and after a day therein appointed, not being later than One Year after the passing of this Act, the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, and *Tasmania*, and also, if Her Majesty is satisfied that the people of *Western Australia* have agreed thereto, of *Western Australia*, shall be united in a Federal Commonwealth under the name of the Commonwealth of *Australia*.

And whereas We are satisfied that the people of *Western Australia* have agreed thereto accordingly.

We, therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the First day of January One thousand nine hundred and one the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, *Tasmania*, and *Western Australia* shall be united in a Federal Commonwealth under the name of the Commonwealth of *Australia*.

Given at Our Court at *Balmoral*, this Seventeenth day of *September*, in the Year of our Lord One thousand nine hundred, and in the Sixty-fourth Year of Our Reign.

GOD SAVE THE QUEEN!

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QUEEN VICTORIA'S PROCLAMATION OF THE COMMONWEALTH.  
(Reduced Facsimile)

and Imperial sentiment, and in the main preserve the royal prerogative without creating the evil of a multiplicity of appeals." \*

With this modification, the Bill passed the Imperial Parliament, and was signed by the Queen on the 9th July, 1900. The attempts of the Western Australian delegate to obtain more advantageous fiscal concessions for his State, and of the New Zealand delegate to reserve for the people he represented a right to come into the Federation at any time with the full rights of an original State, proved futile. It is interesting to observe that a duplicate signed copy of the Constitution, together with the pen, ink-stand and table used by the Queen on the occasion, now occupy a place in the Federal Parliament buildings.

The colony of Western Australia had as yet remained outside the pale of those who had accepted the Constitution, but on the last day of July its inhabitants decided by a vote of 44,800 to 19,691 that it would be to their advantage to enter as an original State. A Royal proclamation was thereupon issued, declaring that the six colonies should be united <sup>Inclusion of</sup> <sub>Consummation.</sub> on the first day of the new century (1st January, 1901). The inauguration of the Commonwealth was celebrated in the Centennial Park, Sydney, the Earl of Hopetoun,

\* W. Harrison Moore, "Commonwealth of Australia," p. 139.

the first Governor-General, being sworn into his new office on the occasion; and in the following May, the Duke of York, our present Gracious King George V., opened the first session of the Federal Parliament in Melbourne.

## CHAPTER VIII.

### THE AUSTRALIAN CONSTITUTION.

The "Commonwealth of Australia Constitution Act" specifies in detail the powers and functions of the Executive, the Parliament and the Judiciary of the Federation. It also deals with the division of powers between the Commonwealth and States, and makes provision for the admittance of new States and for the alteration of the Constitution. It devotes one chapter to finance and trade, and another to miscellaneous matters. In order to facilitate comparison between the various federal systems, it is proposed to discuss the Constitution under six headings, and to employ the same divisions as far as is practicable in subsequent chapters when discussing the federal constitutions of other countries. The six headings are:—

- (1) The Executive.
- (2) The Legislature.
- (3) The Division of Powers.
- (4) The Judiciary.
- (5) Provision for Constitutional Amendment.
- (6) Relation to the Empire.\*

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\* This heading, of course, applies only to dependencies of the British Crown.

## THE EXECUTIVE.

The Governor-General.

The Federal Executive power in Australia is vested in the Sovereign of Great Britain, and is exercised by his representative, the Governor-General of Australia. His Excellency is also Commander-in-chief of the naval and military forces of the Commonwealth. He is paid a salary of ten thousand pounds, an amount which Parliament cannot alter during the continuance in office of any individual Governor. It is his function (1) to act as the representative of the Home Government, and, therefore, to safeguard Imperial interests, and (2) to act as the head of the Federal legislative and administrative systems. He is empowered, like any constitutional head, to summon, prorogue or dissolve Parliament, though by a special enactment of the Constitution he must not allow twelve months to intervene between any two sessions. This has become a permanent feature of all British Constitutions since the English Revolution of 1688. The Governor-General exercises his own discretion to a limited extent, and under special circumstances only. He may assent to, withhold his assent from, or reserve for the Sovereign's pleasure, any Bill that has passed through the two Houses of Parliament. It is improbable, however, that he would exercise his power of veto unless he were con-

vinced that a proposed measure was opposed to Imperial interests. He may also suggest amendments for the Parliament's consideration. Imperial interests are further safeguarded by the King's power to disallow any law assented to by the Governor-General provided the Royal veto is expressed within one year of the Vice-regal assent. "This method of conserving Imperial interests is more satisfactory and more in harmony with the larger measure of self-government granted by the Constitution than the old system of instructing the Governor not to assent to certain classes of Bills, many of which were quite within the competence of the Colonial Legislatures and related to matters of purely local interests."\* The Royal veto would not be exercised in matters of purely Australian concern, as it is one of the fundamental features of British colonial policy that the colonies should be self-governing and free from interference, except when their legislation involves Imperial and international relations.

The Governor-General is also at liberty to exercise his discretion at times of political crisis, when he may either select new advisers, or dissolve Parliament and thus allow the electors to decide the issues. But under all other circumstances he is expected to act with

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\* Quick and Garran, "Annotated Constitution of the Australian Commonwealth," p. 963.

the advice of the Federal Executive Council, consisting of the Ministers of the Crown. According to one of the fictions of "responsible government," the members of the Executive are appointed by the Governor-General. In

Its Responsibility  
to Parliament.

reality they are indirectly chosen by the popularly elected House, in that the Governor-General accepts as his chief adviser or Prime Minister only such a one as enjoys the goodwill or confidence of a majority of the members in that House, and commissions him to form a Ministry. This he does by selecting certain other individuals in his party to be his colleagues, though, in the case of the Labour Ministry, the colleagues are selected at a caucus meeting of the party in power, and office is then allotted to them by the leader himself. This executive continues in office until it has lost the confidence of the Lower House. Want of confidence may be expressed in several ways, but chiefly through the defeat of some Government measure or by means of a vote of censure. It is immaterial whether the vote of censure is directed against the Cabinet as a whole or against any single member of it. For in the British Cabinet system, as has already been stated,\* collective responsibility prevails, and the whole Cabinet usually stands or falls by the political actions of its individual members.

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\* *Ibidem supra*, Chapter III., pp. 65-6.

The Executive's dependence on Parliament is further secured by its control over the public funds, and by the clauses which require Parliamentary sanction before the number in the Executive can be increased beyond seven, or the remuneration to the Ministers can exceed £12,000. A noteworthy feature in the Federal Constitution is the clause, to which attention has already been drawn, requiring every Minister of the Crown to be a member of either the Senate or the House of Representatives. Such a course is the rule in all British dependencies where responsible government obtains, but it is a rule generally implied rather than explicitly stated.

The Federal Executive is charged with the administration of the Federal departments and Federal law. Consequently, our Federation is a truer and more logical federal system than that of Germany or Switzerland, where federal legislation is administered by State or Cantonal Governments. The present Australian Executive consists of the Treasurer, the Attorney-General, the Ministers of External Affairs, Home Affairs, Defence, Trade and Commerce, the Postmaster-General, the Vice-President of the Executive Council, and perhaps an honorary Minister or two. The Prime Minister may personally administer any one of these departments, and in the present Ministry has charge of the Treasury.

*The Functions of  
the Executive.*

The corporate policy and joint responsibility of the Cabinet, together with the dependence of the Executive on Parliamentary goodwill for its continuance in office, render the Federal system of Australia a complete contrast to that of the United States. In the latter country, there is a practically independent one-man Executive, the President, assisted by a number of Secretaries of Departments honoured with the title, but scarcely with the power, of Ministers. "The Cabinet system, and the mutual dependence of Executive and Legislature which it involves, is recognised in the (Australian) Constitution, and constitutes a vital difference from that completeness which marks the separation of the functions in the American system."\* This contrast will be more clearly understood when the chapter dealing with the United States has been studied.

#### THE LEGISLATURE.

The Parliament of the Commonwealth consists of (a) the King of Great Britain represented by the Governor-General; (b) a Senate, and (c) a House of Representatives.

**The Senate—Equality of States.** The Senate is the States' Council; in other words, the distribution of Senators is based on the principle of "Equality of States." Each State, irrespective of its population, elects six

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\* W. Harrison Moore, "The Commonwealth of Australia," p. 28.

members, the people of the State voting as one electorate. Thus Tasmania, with its population of less than 200,000 has the same numerical strength in the Senate as New South Wales, although the latter has over eight times the population of Tasmania.\* Queensland, Tasmania, South Australia and Western Australia whose Senators represent less than 1,500,000 inhabitants, have in combination twice the voting strength of New South Wales and Victoria with their 3,000,000 inhabitants. This distribution seems on the surface to be grossly inequitable and undemocratic. Yet, on the other hand, had the interests of the smaller States not been thus safeguarded, nothing would have induced them to join the federation. Moreover, as the House of Representatives is elected on a population basis, the claims of the majority of people are well safeguarded. It is to the credit of the framers of the United States Constitution that they invented this ingenious method of reconciling the claims of the greater number of citizens with the interests of the greater number of States. The two systems of representation in combination—*i.e.*, that employed in electing Senators, and that employed in electing Representatives—guarantee that both a majority of the people and a majority of the

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\* *I.e.*, 1,650,000.

States will be in favour of proposed measures before they can be accepted. There is no real danger, therefore, to democracy in giving the States equal representation, for, as Garran points out, "A majority in the Senate may conceivably represent a minority of citizens; but such a majority can never compel legislation—it can only prevent legislation. And the legislation which it is likely to prevent is precisely that which, in a federation, ought to be prevented; legislation, that is to say, which is offensive to a majority of the States. . . . A combination which enabled a bare majority of citizens to force new legislation upon an unwilling majority of States" would never have been acceptable to the smaller States. State interests are safeguarded in all modern federations. Even in Germany and Canada, where the States are not equally represented in Bundesrath and Senate respectively, the system comes nearer to equality of representation than to representation according to population.

Parliament may increase or diminish the number of Senators, but must do so without disturbing the principle of equal representation of the original States, and without reducing the number for any of these original States. Senators are chosen for a term of six years; they retire in rotation, one-half at the end of one period of three years, and the other

half three years later. This scheme of rotation is an attempt to ensure a certain amount of continuity of policy. The personnel of the Senate is not subject to such complete and sudden change as is the case with the House of Representatives. It was hoped that a check would thus be provided against sudden radical changes without unduly delaying legislation upon which the people were intent. It was also thought to be a safeguard against passing whims, and it was expected that the system of rotation applied to the Senate would prevent that Chamber from being in its views a mere duplicate or reflex of the House of Representatives. But Senators are elected by the same voters, only differently grouped, as the Representatives themselves. It is questionable, therefore, whether the intended check would be sufficiently powerful to be effective. For this reason one critic has declared that "Whatever the merits of an Australian Senate in other ways, from the circumstances of its origin, it can hardly be expected to fulfil the ordinary purposes of a second chamber."\*

The democratic method of electing Senators affords an interesting point of contrast with the systems in operation in other federations. In the United States, Senators are elected for a period of six years by the various State

\* Egerton, "Federations and Unions in the British Empire," p. 193.

Legislatures; in Canada they are appointed for life by the Governor-General; in Germany members of the Upper House (the Bundesrath), are delegates appointed by and acting under the instructions of the rulers of the various States; and even in democratic Switzerland some of the members of the States' Council are elected by State Legislatures. To be precisely logical, a State should elect its Senators in the way best suited to itself, as they are State and not National representatives. But, as the State is sufficiently identified with all the electors in that State voting as one electorate, the logic of the situation is immaterial. It is evidence of considerable weight that Australia is in the vanguard of democracy when it is remembered, in addition, that the qualifications for membership in the Senate are practically as wide as adult suffrage itself. Three years' residence within the Commonwealth is the only added condition. On the other hand, the Australian system of electing States' representatives is defective in at least one respect. Public opinion is not necessarily correctly represented in the views of the Senate. For it is possible that without some system of preferential voting the six Senators chosen to represent a State may belong to one political party, whilst the electors themselves may be fairly evenly divided between two opposed parties,

one party having just sufficient preponderance of supporters to secure the return of all its candidates.

The House of Representatives is the popular chamber in a sense in which the Senate cannot be; for its members are elected on a population basis, the numbers allotted to the several States being proportional to their respective populations.

In order to determine the number of representatives to which each State is entitled, the *Distribution of Members*. quota (*i.e.*, the number of people each member should represent) must be first ascertained. To obtain this, the total population of the Commonwealth—which for electoral purposes is calculated every five years \*—is divided by twice the number of Senators. This quota is then divided into the population of the separate States, and the resultant quotients indicate the number of representatives for each State. Whenever the remainder is greater than one-half of the quota, the State concerned receives an additional representative. The number of members in the House of Representatives is approximately twice the number of Senators, but the clause fixing the minimum representation for each State at five disturbs the exactness of this

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\* *I*vide Representation Act, 1905. The day on which the population is calculated is called by this Act "Enumeration Day." Before 1905 the representation was based on the latest statistics of the Commonwealth.

ratio. The details of this scheme of representation will be more fully grasped by a study of the following tabulated illustration:—

STATE.	Population in 1911 and exclusive of aborigines.	Quota for deter- mining represen- tation to which each State is en- titled.	Result of dividing State's popula- tion by Quota.	No. of Repres- sentatives to which each State is en- titled.
New South Wales	1,646,734	4431409	26·7	27
Victoria ...	1,315,551	—	21·3	21
Queensland ...	594,514	—	9·6	10
South Australia ...	408,558	72	6·6	7
West Australia ...	274,841	=61547·36	4·4	5
Tasmania ...	191,211	—	3·1	5
The Commonw'lth	4,431,409	—	—	75

It will be observed that according to the mathematical calculation, Western Australia should have but four and Tasmania but three members, which would then give a total of seventy-two for the Commonwealth. But these two States receive the minimum representation of five members each, and consequently the number of representatives is in the aggregate seventy-five. The membership of the popular Chamber was deliberately made double that of the Senate so as to assure its overwhelming predominance in the event of a joint sitting.\*

\* *Vide infra*, pp. 170-1.

The extent of representation for new States admitted into the Federation is left to the discretion of the Federal Parliament, which has also the power to grant to territories administered by it whatever representation it thinks fit. A new State can be carved out of an old State, or States can be united, only with the consent of the State Parliaments concerned. Before State boundaries can be changed, both State Parliaments and State electors must signify their approval.

Representatives are elected for a period of three years, though the House is subject to dissolution before the expiration of that period. Any person over the age of twenty-one, if a natural born subject, or naturalised for at least five years, who has resided for three years within the Commonwealth, and is a properly qualified elector, is constitutionally qualified to be elected to either House. But he must not be a subject of a foreign Power, attainted of treason, or under sentence of imprisonment for more than one year, or a bankrupt. Neither must he hold an office of profit under the Crown (other than a Ministerial office) nor have any pecuniary interest in the undertakings of the Public Service, except under special conditions. Pensioned soldiers or sailors also are debarred.

The House of Representatives is the dominant House of the Federal Parliament.

*The relation of the Houses.*

In the first place, whilst the powers of the two are co-ordinate in most matters, the popular Chamber has the sole right to introduce Bills appropriating revenue or imposing taxation. The Senate may not even amend such Bills. It must either accept or reject them *in toto*, though it has the right to suggest omissions or amendments for the consideration of the other House. On the other hand, the Senate's right to amend other Bills is fully protected by the disallowance of what is termed "tacking," that is, including other matters in Bills dealing with revenue or expenditure.

**Provision against Deadlocks.**

The passage of a Bill through the two Houses indicates that the measure is favoured, not only by the representatives of a majority of the people, but also by a majority of States. In the event of a deadlock between the two Houses, the double numerical strength of the House of Representatives over that of the Senate\* ensures that in the event of a joint sitting the will of the former, if at all unanimous, will prevail. Should the Representatives pass a Bill twice, and the Senate fail to pass it, or insert in it amendments distasteful to the other Chamber, the Governor-General may dissolve both Houses (provided that a general election is not due

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\* The maintenance of this ratio of two to one is also a protection to the Senate, in that it doesn't permit the number of Representatives to be so increased as to add to the dignity of the National House, and lead to the impotence of the Senate.



SIR GEORGE HOUSTRON REID

High Commissioner for Australia  
*After the original oil painting, by Gordon Connell,  
in the Mitchell Library.*



SIR EDMUND BARTON

First Prime Minister of Australia



within six months), and require the people to elect two new Houses. If the two Chambers continue to differ about the same proposed legislation, a joint sitting is held. If the proposed law, with or without any of the disputed amendments, is accepted by an absolute majority of the total number of the members of the Senate and the House of Representatives, the law is regarded as duly passed by the two Houses. As the total voting strength of the two Houses is one hundred and eleven, of which seventy-five are Representatives, it requires but a respectable majority of the National House and a respectable minority of the Senators to be united in their views in order to win the day. It is then presented to the Governor-General for his assent.

This provision for the treatment of deadlocks is quite a novel piece of legislation. No other federation requires the dissolution of the Upper House when it is in disagreement with the Lower House. The nearest approach to it is the provision in the Swiss Constitution, by which the whole Parliament is dissolved when the people by a referendum declare in favour of constitutional amendment which Parliament itself does not favour.

## CHAPTER IX.

### THE AUSTRALIAN CONSTITUTION— (Continued.)

#### THE DIVISION OF POWERS.

Subjects of Legislation Classified.

The Australian Constitution resembles more nearly that of the United States than that of Canada in one very important respect. State rights are jealously guarded. The Federal Government, instead of being invested with the control of all unspecified matters, as is the case in Canada, is limited in its operations to the matters actually enumerated in the Constitution, whilst the residue is controlled by the States. All the possible subjects of legislation can be grouped into three classes:—

- (1) The subjects—few in number—in which the Commonwealth has exclusive powers of legislation. In these cases the State laws ceased to operate at the inauguration of the Commonwealth.
- (2) The subjects in which the States and the Commonwealth's powers of legislation are concurrent. On these questions the State laws hold good only so far as they are not invalidated by Federal laws.

(3) The subjects on which the Commonwealth has no power to legislate. Naturally these are the subjects in which the States exercise sovereign powers.

The Federal Parliament has power to make laws with respect to foreign and interstate trade and commerce (but not intra-State trade), customs and excise, bounties on exports and goods produced within the Commonwealth, borrowing on the public credit of the Commonwealth, postal, telegraphic and telephonic services, naval and military defence, lighthouses and kindred concerns, meteorological and astronomical observations, quarantine, fisheries beyond the territorial limits, census and statistics, banking and insurance, weights and measures, exchange and promissory notes, bankruptcy, copyrights, naturalization, marriage and divorce, foreign corporations, invalid and old age pensions, civil and criminal processes, immigration and emigration, external affairs, the Pacific Islands, railways for military and naval defence, railway construction within a State with the State's consent, and conciliation and arbitration in disputes extending beyond the limits of one State. The customs and excise department was taken over by the Central Government immediately on the inauguration of the Commonwealth, whilst the postal department,

The Powers of  
the Federal Parlia-  
ment.

lighthouses and lightships, beacons and buoys, the administrations of defence and quarantine were subsequently transferred when the Federal Parliament was prepared to accept them. The transfer of the officers and property was effected with the maintenance of the accrued rights of the former in the matter of pension, and compensation to the States for the latter.

With the one limitation that States may levy such charges on imports and exports as will recoup them for executing State inspection laws, customs and excise are exclusively Federal concerns. Two conditions, however, must be observed—one by the States, the other by the Commonwealth:—(1) Absolute free-trade between the various States must prevail, though Western Australian interests were protected by a special clause which allowed them to continue for five years the imposition of duties on goods from other States. These duties were diminished year by year until they reached vanishing point. (2) Federal duties must be uniform throughout the Commonwealth. As regards bounties, the States still retain the right to grant aids or bounties on mining for any metal, and also, with the Federal Parliament's assent, to grant bounties on the production or export of goods.

The Powers of the State Parliaments. The States exercise all powers not enumerated in the list of Federal powers. They

still control lands and public works, trade and industries within their own boundaries, justice, the railways, education and local government. The State Constitutions and the powers of the State Parliaments, where not vested in the Commonwealth Parliament, and as they existed previous to the Federation, are guaranteed. The Governors are appointed directly by the Home Government without reference to the Governor-General.\* and are entirely independent of Federal control. "In matters not expressly transferred to the Commonwealth, Australia still speaks with six voices instead of one."†

But certain acts are specifically forbidden to the States. They cannot, for instance, raise naval or military forces, or tax Federal property unless the National Parliament consents, or coin money. The Commonwealth, on the other hand, must exempt State property from Federal taxation, guarantee religious freedom, and refrain from establishing a national church. It further undertakes to protect a State from invasion, and at the State's request even from domestic violence. In return, the State prisons are at the disposal of the Commonwealth for offenders against Federal laws.

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\* Contrast Canada.

† Egerton, "Federations and Union in the British Empire."

At the time when the Commonwealth was in the "process of making," there was some thought of handing over the railways to the Central Parliament. They were, however, left to the States, probably because railway construction is so closely associated with the opening up of the land, which is essentially a State matter, and also because they were a valuable source of revenue and a good security for the State debts. Moreover, it is only the long distance interstate lines that have even the suggestion of Federal significance. Of course, the Federal Parliament can carry railways through any territories administered by it or in any State with the consent of that State. The States may surrender any part of their territory to the Commonwealth. Accordingly the Northern Territory of South Australia was transferred to the Commonwealth Government on the 1st January, 1911. British New Guinea has been Federal Territory since 1906. The Central Parliament is now intent on constructing a transcontinental railway to connect Darwin with the southern States and ports. It has also received the necessary authorisation from South Australia and Western Australia, and taken the preliminary steps in the construction of railway connection between Port Augusta and Kalgoorlie.

The financial arrangements between the Financial relations. Commonwealth and the States were most difficult of adjustment. Unless satisfactory to every State, there was a fear that the whole Federal scheme would be wrecked. The surrender of customs and excise administration to the Commonwealth seemed inevitable, yet the States would thereby be deprived of a large source of revenue. After several suggestions had been discussed, a proposal—popularly known as Braddon's blot \*—was made by Sir Edward Braddon of Tasmania, and eventually accepted by all the other States. It was arranged that for a period of ten years and thereafter until other provision had been made by Parliament, the Commonwealth should expend but one-fourth of the customs and excise returns, whilst the remaining three-quarters should be returned to the various States in proportion to the amount received from each, less the expenditure incurred in its collection. A re-arrangement was effected in 1910, to hold good for another ten years, whereby the Commonwealth now pays to each State twenty-five shillings per annum for every person residing therein.

The Constitution provides for the surrender The State Debts. of State debts to the Commonwealth, but the latter must be indemnified by the State. The

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\* *Vide Chapter VII.*

interest payable must be deducted from the amount that the Commonwealth has to pay over to the States. It was thought at the time of the inauguration that, if the Federation took over those liabilities, it would compensate the States for the loss of some of the sources of revenue, such as customs. Secondly, it seemed good economy, as it was anticipated that the Federal Government, representing a larger body politic, would be able to borrow on better terms than the individual States. However, the transfer of the debts has not yet been effected, though, as the result of a referendum in 1910, the Commonwealth may take over from the States the debts incurred since the inauguration of the Commonwealth, as well as those existing prior to 1901.

In addition to the provisions already indicated, the Federal Parliament must distribute its surplus revenue among the States, and may grant financial assistance to any State. But in other respects no preference must be shown to any State in the laws concerning trade, commerce or revenue. Nor must such laws interfere with the rights of a State or its residents to the reasonable use of the rivers for conservation or irrigation. Trade and commerce generally are to be placed under the control of an Interstate Commission. In 1912 a measure was passed through Parliament defining the powers of such Commission.

## THE JUDICIARY.

Having dealt with the powers of the Legislature and Executive, we now come to the Judiciary. As Chief Justice Marshall of the United States points out, "The difference between the departments undoubtedly is that the Legislature makes, the Executive executes, and the judiciary construes, the laws."<sup>\*</sup> The judicial power is exercised by a Federal Supreme Court, termed "the High Court of Australia," and such other federal courts as the Parliament may create or invest with Federal jurisdiction. The only other court as yet established by Parliament is the Commonwealth Court of Conciliation and Arbitration. The High Court consists of a Chief Justice (at present Sir Samuel Griffith) and six Puisne Judges (Barton, Isaacs, Higgins, Duffy, Powers and Rich). The judges are appointed by the Governor-General on the advice of the Executive, and they are rendered independent of political or external pressure in the usual way, *i.e.* (1) by having a salary fixed and undiminishable during their continuance in office, and (2) by being irremovable from office except for proven misbehaviour or incapacity, and then only on an address from the two Houses of Parliament to the Governor-General. The

The Federal Courts.

\* *Vide* W. Harrison Moore, "The Commonwealth of Australia," p. 25.

salary of the Chief Justice is £3,500 per annum, and of each of the other judges £3,000.

Appellate Jurisdiction.

The High Court has both appellate and original jurisdiction. Appellate jurisdiction is exercised when cases are brought before it on appeal from other courts, either State or Federal. The High Court hears appeals (1) against the decision of any of its own Justices exercising original jurisdiction; (2) from other Federal Courts, the Supreme Courts of the States and certain other State Courts; (3) from the Interstate Commission (not yet established) as to questions of law. In these cases, the decision of the High Court is final, since no appeal is allowed to the King in Council unless the High Court itself sanctions it, or "the King himself," *i.e.*, the Judicial Committee of the Privy Council, exercises the Royal prerogative to grant special leave of appeal. In so far as appeals to the Federal High Court are allowed in cases in which the citizens and law of a single State are concerned, the logical application of the strictly federal idea that matters of concern to one State only should be left to that State is abandoned. But the allowance of such appeals carries with it the compensating advantage of securing a more uniform interpretation of the law throughout Australia.

Original Jurisdiction.

Original jurisdiction is the treatment of cases brought directly, and in the first instance to

the High Court, and not referred to it from some lower court. Original jurisdiction is exercised by the High Court in all matters (1) arising under any treaty; (2) affecting consuls or foreign representatives; (3) in which the Commonwealth is suing or being sued; (4) between States, residents of different States, or a State and a resident of another State, or (5) in which an injunction is being sought against a Federal officer. The extent of its original jurisdiction can be further extended by Parliament, with, of course, due regard for State rights. For instance, disputed elections have been referred to the High Court since 1902. The jury system is recognised in that all offences against Federal law are tried before juries in the State in which the offence is committed.

Perhaps the most interesting and prominent function of the High Court is to act as the "Guardian of the Constitution." In order to guard against encroachment on State rights and functions by the Federal Parliament, it is permissible for an individual or a State to test the validity of a Federal law by an appeal to the High Court. The Federal functions are similarly protected against State encroachment. "Every law that comes before them, whether of the Commonwealth or of a State, they must test by the Federal Constitution and pronounce it valid or void

according as it does or does not come within the scope of the powers allotted to the Legislature which enacted it."\* When a State law conflicts with the Federal Constitution, the former is invalid. But if a State law conflicts with a Federal law, the former is not declared invalid until it is first determined by the Court whether, according to the Constitution, the Federal Parliament had power to pass the law. If the Federal law is constitutional, the State law is invalid to the extent of its conflict with the Federal law in matters where concurrent powers are allowed, and altogether invalid in matters over which the Federal Parliament has exclusive powers. But if the Federal law is unconstitutional, then the State law still holds good.

By an amending Judiciary Act (1912) the Justices on the High Court Bench were increased from five to seven, and at the same time it was laid down that a Full Court consisting of less than all the Justices cannot decide on a matter in which the Constitutional powers of the Commonwealth are called in question unless a majority of all the judges concur in the decision. In cases of appeal from a High Court Judge or a State Supreme Court, the decision appealed from holds good when there is an equal division of opinion,

but in other cases where the Court is equally divided the opinion of the Chief Justice or Senior Justice present is the deciding factor.

#### AMENDMENT OF THE CONSTITUTION.

The Australian Constitution, like other federal constitutions, is of the "rigid" type. In other words, it cannot be amended by the ordinary legislative process. As already indicated, this precaution is intended to prevent the States becoming the prey of the Commonwealth. When changes are desired, it is necessary to secure the consent of the people in a majority of the States. Amendments are thus effected by more democratic means than in the United States. In the first place, a proposed law has to be accepted by an absolute majority of each of the Federal chambers. "In the important matter of the amendment of the Constitution the power of initiation lies in the Parliament, and is not, as in the United States, shared with the States' Governments, or, as in Switzerland, with the people."\* Should, however, one House propose an alteration twice within the same or consecutive sessions, and the other House reject it or amend it in a way unacceptable to the former the effect is the same. In the second place it is submitted to the electors—that is, a referen-

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\* W. Harrison Moore. "Commonwealth of Australia," p. 32.

dum is taken. A referendum may be described as an appeal to the people through the ballot box on some question other than the election of representatives. It is a substitute for the "primary assemblies" or assemblies of the whole people. "The orator is replaced by the writer, the ecclesia by a few hundred polling booths; but the voice of the people cries 'Aye' or 'No' as clearly as if they were gathered together in a market place or Senate House."\*

The referendum is employed for the purpose of ratifying or vetoing constitutional amendments, or for altering State boundaries. The people's assent to ordinary legislative measures is not sought. Two conditions have to be satisfied before the people can be regarded as having signified their acceptance of the amendment; (a) it must be assented to by a majority of the total number of electors voting throughout the Commonwealth; (b) it must also be accepted in a majority of States by a majority of electors voting. The second condition safeguards, to some extent, the interests of the individual States.† When it is a question of diminishing the representation of a State, it is necessary to secure the approval of the people of the State interested before the change can be effected. On this question we

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\* Garrau, "The Coming Commonwealth," p. 135.

† *Vide Chapter X*, p. 212 Footnote for Examples of the Referenda.

have followed the example of the United States and again safeguarded State interests.

Once again the advanced democratic temper of the Australian people is evident when we compare this method of amendment with the methods in force in other countries. In the United States proposed alterations are dealt with by the Legislatures or Conventions without any direct reference to the people; in Canada the British Parliament effects the amendment; in Germany it is dealt with in the Federal Parliament. Switzerland alone, of all the federations outside Australia, employs the referendum, and its final stages in the "process of amending" are similar to the Australian system. But in the allowance of the initiative and the employment of the referendum for ordinary legislative measures, that country is even more democratic than we are.

#### IMPERIAL TIES.

In conclusion, some reference to our connection with the British Empire is necessary. Less than a century ago the colonies were regarded rather as dependencies established for the convenience and advantage of the Home Country, than as sister States peopled by kinsmen entitled to full rights of citizenship and freedom of trade. Oppression and shortsightedness resulted in the loss of the United

States, and, sixty years later, in rebellion in Canada. But as a result of Lord Durham's report and recommendations concerning Britain's colonial policy, the Imperial Government revised its attitude towards the colonies, and conceded the full rights of "responsible government" whenever a colony was sufficiently developed to undertake the responsibility. The Imperial connection was maintained, but so as to give fullest freedom of government to the colonial powers. Thus the reconciliation of *Imperium* and *Libertas* (Imperial connection and colonial freedom), was effected. In Australia the Imperial link is maintained by the appointment of the

1. Governor-General by the Home Government, and the grant to him, as the royal representative, of the power of veto over legislation. The
2. Royal Veto. King has also a direct power of veto, even though the Governor-General has previously signified his assent. The States, too, are directly linked to the Home Government by
3. State Governors having their State Governors appointed by the Imperial authorities instead of by the Governor-General, as is the case in Canada. In one other respect Australia enjoys greater freedom than Canada, *i.e.*, the control of constitutional amendments is in our own hands. The Home
4. Constitutional Amendment (nominal). Parliament has but a normal right, which it is unlikely ever to exercise, to make paramount laws on all subjects or to amend the Constitu-



SIR SAMUEL W. GRIFFITH  
Chief Justice of the High Court of Australia



MR. JUSTICE R. F. O'CONNOR  
High Court of Australia



tion for us. As already observed, the amending power in connection with Canada's Constitution lies with the Imperial Parliament. Moreover, appeals to the Privy Council from the High Court of Australia are allowed in exceptional cases, though this right of appeal is little more than nominal and may conceivably fall into disuse.

Great Britain still undertakes to protect us,\* to control for the whole Empire the question of Foreign Policy, peace or war, and to arrange all foreign treaties (though in 1911 the views of the colonial representatives on matters connected with the Empire's foreign policy were for the first time heard). Moreover, "No Colonial Legislature can annex territory or cede territory; such powers can be exercised only by the Crown in its Imperial capacity or by virtue of an express delegation of that power."<sup>†</sup>

The Imperial Parliament also claims the power to make laws binding on the whole Empire, and laws of Imperial scope have always been accepted without question by the colonies. To such an extent have the component parts of the British Empire advanced beyond the old colonial policy, that the colonies, instead of being regarded as subordinate dependencies, are now to be consulted on all matters of Imperial concern, and

\* See however, pp. 213-5.

† W. H. Moore, "The Commonwealth of Australia," p. 61.

9. Imperial Conferences.—The Imperial Conferences at which the various colonies are represented have become a permanent institution and a feature of increasing significance in Imperial progress. Whether the scheme will develop into some form or other of Imperial Federation is for the future to decide. The twentieth century belongs not to nations but to Empires, and it is to our interest to remain attached to the greatest of all Empires. It is, therefore, well for us to remember the momentous caution of Joseph Chamberlain, "We must either draw closer together or we shall drift apart."

## APPENDIX TO CHAPTERS VIII. AND IX.

### THE "COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT."

63 and 64 Vic. cap. 12. (Clauses selected and condensed).

The paragraphs within brackets [ ] are condensed statements of clauses which, for the purposes of this work, do not require the full text.

The phraseology of the quoted sections is occasionally slightly altered for the sake of brevity.

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of the State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia, and in force at the establishment of the Commonwealth.

#### CHAPTER I.—THE PARLIAMENT.

##### PART I.—GENERAL.

###### LEGISLATIVE POWER.

I. The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate, and a House of Representatives.

## THE GOVERNOR-GENERAL.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

[Sections 3-4 fix the Governor-General's salary at £10,000, not to be altered during his continuance in office.]

## THE MEETING OF PARLIAMENT.

5. The Governor may appoint such times for holding the session of the Parliament as he thinks fit, and may also from time to time by proclamation or otherwise prorogue the Parliament, and may in like manner dissolve the House of Representatives.

## ANNUAL SESSIONS.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session, and its first sitting in the next session.

## PART II.—THE SENATE.

## COMPOSITION OF THE SENATE.

7. The Senate shall be composed of Senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. . . . Until the Parliament otherwise provides, there shall be six Senators for each original State. The Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several original States shall be maintained, and

that no original States shall have less than six Senators.

#### QUALIFICATION OF ELECTORS.

8. The qualification of electors of Senators was made the same as that of electors for the Representatives, each elector being given one vote only. The State Legislatures may prescribe the method of choosing Senators subject to any Federal laws on the subject, but Federal laws shall prescribe a uniform method for all the States.

#### NORMAL TERM FOR SENATORS.

[Clause 13 provides six years as the normal term for Senators, one-half of whom retire every three years.]

#### CASUAL VACANCIES.

15. If the place of a Senator become vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session, the Governor of the State, with the advice of the Executive Council, may appoint a person to hold the place until the expiration of fourteen days after the beginning of next session, or until the election of a successor whichever first happens. At the next general election of members of the House of Representatives, or at the next election of Senators whichever first happens, a successor shall if the term has not then expired, be chosen to hold the place until the expiration of the term.

#### QUALIFICATION OF SENATORS.

16. The qualifications of a Senator shall be the same as those of a member of the House of Representatives.

## VACANCY THROUGH ABSENCE.

[20. A Senator vacates his place if absent without the Senate's permission for two consecutive months of a Session.]

## PART III.

## THE HOUSE OF REPRESENTATIVES.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of Senators. The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined in the following manner:—

I. A quota shall be ascertained by dividing the number of the people of the Commonwealth by twice the number of the Senators.

II. The number of members for each State shall be determined by dividing the number of the people of the State by the quota; and if there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But five members at least shall be chosen in each original State.

## ALTERATION OF THE NUMBER OF MEMBERS.

27. Subject to this Constitution, the Parliament may increase or diminish the number of members of the House of Parliament.

## DURATION OF THE HOUSE.

28. Every House of Representatives shall continue for three years from the first meeting of the House and no longer, but may be sooner dissolved by the Governor-General.

## QUALIFICATIONS OF MEMBERS.

134. Qualifications of a Representative are as follows:—He must be twenty-one years of age, an elector, three years resident in the Commonwealth, a subject of the Queen, natural born or naturalised for at least five years.]

## PART IV.

## BOTH HOUSES OF THE PARLIAMENT.

MEMBERS OF ONE HOUSE INELIGIBLE  
FOR THE OTHER.

43. A member of either House shall be incapable of being chosen as a member of the other House.

## DISQUALIFICATIONS.

44. Any person shall be incapable of sitting as a member of either House who—

- I. is under allegiance to a foreign power, or a citizen of a foreign power, or
- II. is attainted of treason, or convicted or subject to be sentenced for any offence punishable by imprisonment for one year or longer, or
- III. is an undischarged bankrupt or insolvent, or
- IV. holds any office of profit under the Crown or any pension payable out of the Commonwealth revenues, or
- V. has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, except as a member of an incorporated company of more than twenty-five persons.

Sub-section IV. does not apply to the Ministers of State or Commonwealth, or to full or half-paid or pensioned naval and military officers.

## ALLOWANCE TO MEMBERS.

48. Until the Parliament otherwise provides, each Senator and each member of the House of Representatives shall receive an allowance of £400 a year. (This allowance has been increased to £600.)

## PART V.

## POWERS OF THE PARLIAMENT.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

- I. Trade and commerce with the other countries and among the States [section 98 makes this power extend to navigation, shipping and State railways, but section 100 protects the State rights to reasonable use of the rivers for conservation and irrigation.]
- II. Taxation; but so as not to discriminate between States or parts of States.
- III. Bounties on the production or export of goods, but such bounties shall be uniform throughout the Commonwealth.
- IV. Borrowing money on the public credit of the Commonwealth.
- V. Postal, telegraphic, telephonic, and other like services.
- VI. Naval and military defence, and the control of the forces to execute and maintain the laws of the Commonwealth.
- VII. Light-houses, light-ships, beacons and buoys.
- VIII. Astronomical and meteorological observations.
- IX. Quarantine.
- X. Fisheries in Australian waters beyond territorial limits.
- XI. Census and statistics.

- XII. Currency, coinage and legal tender.
- XIII. Banking other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.
- XIV. Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned.
- XV. Weights and measures.
- XVI. Bills of exchange and promissory notes.
- XVII. Bankruptcy and insolvency.
- XVIII. Copyrights, patents of inventions and designs, and trade marks.
- XIX. Naturalisation and aliens.
- XX. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- XXI. Marriage.
- XXII. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
- XXIII. Invalid and old-age pensions.
- XXIV. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.
- XXV. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States.
- XXVI. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.
- XXVII. Immigration and emigration.
- XXVIII. The influx of criminals.
- XXIX. External affairs.
- XXX. Relations with the islands of the Pacific.
- XXXI. The acquisition of property on just terms from any State or person for any purpose

in respect of which the Parliament has power to make laws.

- XXXII. The control of railways with respect to transport for the naval and military purposes of the Commonwealth.
- XXXIII. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
- XXXIV. Railway construction and extension in any State with the consent of that State.
- XXXV. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- XXXVI. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides.
- XXXVII. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law.
- XXXVIII. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.
- XXXIX. Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

## EXCLUSIVE POWERS OF THE FEDERAL PARLIAMENT.

[52. Federal Parliament has exclusive legislative powers with respect to (1) the Seat of Government, and all acquired places; (2) matters affecting the departments of Public Service transferred to the Federal Government; and (3) other matters declared by the Constitution to be within their exclusive power.]

## RELATIVE POWERS OF THE TWO HOUSES.

53. Proposed laws appropriating moneys or imposing taxation shall not originate in the Senate. [Laws imposing fines and penalties, license fees, etc., are not to be affected by this section.] The Senate may not amend such laws, or any laws so as to increase any proposed charge or burden on the people. The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

[54 and 55 provides that appropriation bills or taxation bills shall deal only with appropriation or taxation.]

## RECOMMENDATION OF APPROPRIATION.

56. Appropriation of revenue shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General.

## PROVISION FOR DEADLOCKS.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass

it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months, the House of Representatives in the same or the next session again passes the proposed law with or without amendments made by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of expiry of the House of Representatives.

If after such dissolution, the House of Representatives again passes the proposed law with or without amendments made by the Senate, the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments made by one House and not agreed to by the other, and any such amendments affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of members of the Senate and the House of Representatives, it shall be taken to have been duly passed by both Houses, and be presented to the Governor-General for the Queen's assent.

#### ROYAL ASSENT OR VETO.

[58-60. The Governor declares whether he assents, vetoes, or reserves a law for the Queen's pleasure. He may return a bill with suggested amendments. The Queen may disallow any law within a year of

the Governor-General's assent, and any proposed law reserved for the Queen's pleasure has no force for two years unless the Queen's assent is signified meanwhile.]

## CHAPTER II.

### THE EXECUTIVE GOVERNMENT.

61. The Executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative.

### AN EXECUTIVE COUNCIL.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen by the Governor-General and shall hold office during his pleasure.

### MINISTERS OF STATE.

64. The Governor-General may appoint officers to administer the Department of State of the Commonwealth. Such officers hold office during the pleasure of the Governor-General. No Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives. [65 allows of seven Ministers, unless Parliament provides otherwise.]

### COMMAND OF THE FORCES.

[68. Vests the Command-in-Chief of the naval and military forces of the Commonwealth in the Governor-General.]

### TRANSFER OF DEPARTMENTS.

169. Provides for transference to the Commonwealth of the following departments:—Posts, telegraphs and telephones; naval and military defence; lighthouses, lightships, beacons and buoys, and quarantine; whilst the customs and excise departments are transferred immediately on the establishment of the Commonwealth.]

## CHAPTER III.

## THE JUDICATURE.

## APPOINTMENT OF JUDGES.

[71 and 72 arrange for a Federal Supreme Court—the High Court of Australia—and other courts, federal or otherwise, invested by the Parliament with federal jurisdiction, the High Court to consist of a Chief Justice and at least two other justices. The justices are removable only by the Governor-General in Council, acting on an address from the two Houses in the same session, on the ground of proved misbehaviour or incapacity. Parliament fixes their remuneration which is not diminished during their continuance in office.]

## APPELLATE JURISDICTION OF THE HIGH COURT.

73. The High Court shall have jurisdiction with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences:—

- I. Of any justice or justices exercising the original jurisdiction of the High Court.
- II. Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State or of any court of any State from which, at the establishment of the Commonwealth, an appeal lies to the Queen in Council.
- III. Of the inter-State Commission; but as to questions of law only, and the judgment in all such cases shall be final and conclusive.

## APPEAL TO THE QUEEN IN COUNCIL.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any

question as to limits of the Constitutional powers of the Commonwealth, any State or States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. . . . Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

#### ORIGINAL JURISDICTION.

75. The High Court has original jurisdiction in matters (I.) arising under any treaty; (II.) affecting Consuls or representatives of other countries; (III.) in which the Commonwealth or its representative is suing or being sued; (IV.) between States or residents of different States or a State and a resident of another State; (V.) in which a writ of mandamus or prohibition or an injunction is sought against a Commonwealth officer. Parliament can confer original jurisdiction on the High Court in matters (I.) involving the Constitution or its interpretation; (II.) arising under laws made by Parliament; (III.) of admiralty and maritime jurisdiction; (IV.) relating to the same subject matter claimed under State laws.

#### TRIAL BY JURY.

[80. Establishes trial by jury, the trial to be held in the State in which the offence was committed.]

### CHAPTER IV.

#### FINANCE AND TRADE.

[81-2. All revenues form one Consolidated Revenue Fund, and the costs of collecting and managing the Fund is the first charge on it.]

### LEGAL APPROPRIATION.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

### TRANSFER OF CONTROL OF BOUNTIES.

86. The collection and control of duties of customs and of excise, and the control of payment of bounties shall pass to the Executive Government of the Commonwealth.

### STATE BOUNTIES.

[90. Makes the Commonwealth's powers on these particulars exclusive, though the States may grant certain bounties with the permission of the Commonwealth Parliament.]

### RETURN OF CUSTOMS REVENUE TO STATES.

87. During a period of ten years after the establishment of the Commonwealth, and thereafter, until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise, not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth. (The Commonwealth now pays to each State twenty-five shillings for every head of the population).

### INTERSTATE FREETRADE.

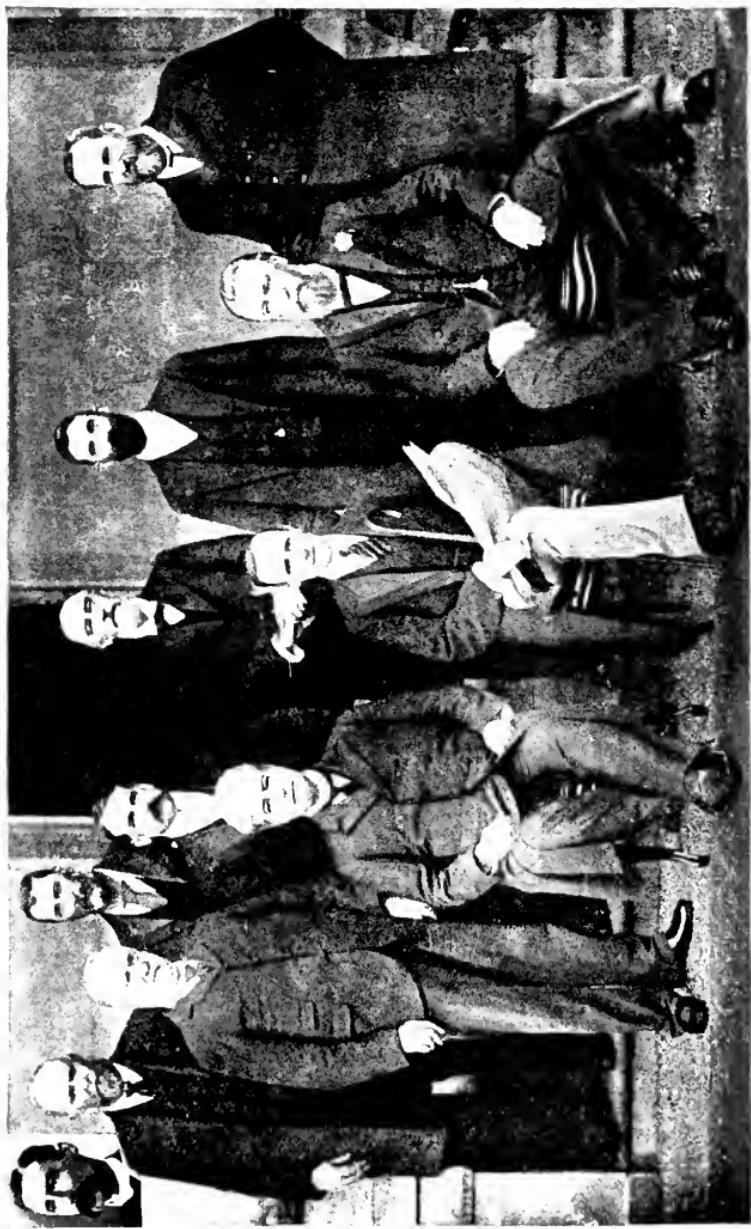
92. Trade, commerce, and intercourse among the States . . . shall be absolutely free. [Section 95 allowed Western Australia a limited right for the first five years of imposing customs duties on goods from



THE FIRST FEDERAL GOVERNMENT

*Sitting*—Sir Edmund Barton, Lord Hopetoun (Governor-General), Sir William Lyne  
*Standing*—Sir John Forrest, Sir George Turner, R. E. O'Connor, N. E. Lewis, Sir J. R. Dickson

A. I'peakin, C. C. Kingston  
*Inset*—J. G. Drake



other States, but the duties were automatically reduced year by year until they ceased at the expiration of the fifth year.]

### THE INTERSTATE COMMISSION.

101. There shall be an inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance within the Commonwealth of the provisions of this Constitution relating to trade and commerce and of all laws made thereunder.

[103. The Commission is to consist of persons appointed by the Governor-General for seven years.]

### STATE DEBTS.

[Section 105 empowers the Parliament to take over the State Debts.]

### CHAPTER V.

### THE STATES.

#### SAFEGUARDING STATE CONSTITUTIONS AND POWERS.

[Sections 106-8 preserve the State Constitutions until altered by the State, the powers of the State Parliaments, unless withdrawn from them by the Federal Constitution, and the laws of the State affecting Federal matters until provision has been made by the Commonwealth Parliament.]

#### INCONSISTENCY OF STATE AND FEDERAL LAWS.

109. When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

#### THE RAISING OF MILITARY FORCES.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain

any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth; nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

#### RELIGIOUS FREEDOM.

116. The Commonwealth shall not make any law for establishing any religious observance, or for prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

#### PROTECTION OF STATES.

119. The Commonwealth shall protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence.

### CHAPTER VI.

#### NEW STATES.

[Sections 121-4. The Parliament may admit new States, and determine the conditions of admission and representation of the new States in Parliament; it may make laws for territories acquired from the States or from the Queen; it may alter the limits of a State with the approval of the majority of the State electors voting on the question, and may, with the approval of the States concerned, form new States out of a part of a State or by a union of States.]

### CHAPTER VII.—MISCELLANEOUS.

#### THE FEDERAL SEAT OF GOVERNMENT.

125. The seat of Government shall be determined by the Parliament . . . and if New South Wales be an original State, shall be in that State, and be distant not less than one hundred miles from Sydney. . . . Such territory shall contain an area of not less than one hundred square miles. . . . The Parliament

shall sit at Melbourne until it meet at the seat of Government.

### CHAPTER VIII.

#### ALTERATION OF THE CONSTITUTION.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses, the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments, subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of

a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

## CHAPTER X.

### THE WORKING OF THE CONSTITUTION.

It is not within the scope of the present work to give a detailed account of the history of the early years of the Commonwealth. But it may not be out of place to refer to a few developments, with a view of showing how the Constitutional machinery has been working. On the whole, there has probably been less friction between the Commonwealth and the States than has been the fortune of the other great federations. It was certainly expected that the *The Tariff*. attempt to frame a Federal tariff would be fraught with considerable difficulty and even danger, because of the supposed inevitable clash between New South Wales freetrade doctrines and Victoria's protectionist interests. The freetraders, however, clearly recognised the necessity for a tariff of some sort in order to produce a Federal revenue. They also realised that, as three-fourths of the customs returns had to be handed over to the States, the proceeds from that source would have to be substantial. Their main purpose, therefore,

was to secure a revenue-producing tariff, and act merely as a check to the extreme protectionists who naturally aimed at a protective tariff. The outcome of twenty-one months of deliberation was a moderate tariff, calculated to give a return of about £8,000,000. Neither party was satisfied with the compromise; the protectionists in particular could not content themselves until the tariff walls had been raised still higher. Consequently there was a revision of rates in 1907 and 1908 which resulted in a substantial increase of the duties. The return from customs and excise in 1910-11 was £13,000,000.

**Preferential Duties** At the same time the principle of preference to the United Kingdom was introduced, and goods produced or manufactured in the Mother Country and shipped direct to the Commonwealth were admitted at duties ranging from two-and-a-half to ten per cent. (but generally five per cent.) below those imposed on foreign goods. In the case of goods partially manufactured in the United Kingdom, the Act required that the final processes should be undertaken therein, and the cost of British material and labour should not fall below one-fourth of the value of the completed goods. Two years previously (1906), goods from British South Africa had received somewhat similar favourable treatment, a reduction of twenty-five per cent. of the rates being allowed on certain

specified articles, including butter, cheese, grains, hay, fodder, feathers, tobacco, agricultural machinery, preserved meats, fish, and timber.\* The following table of selected items affords instances of the extent to which the United Kingdom has been granted a preference since 1911, as well as of the increase in the protective duties. An attempt to encourage the carrying out of the final processes of manufacture in the Commonwealth will also be evident from a study of the rates mentioned.

ITEM.	Tariff in 1902.	General Tariff 1911.	Tariff on Produce or Manufacture of U. K. 1911.
Butter and Cheese ...	3d. per lb.	3d. per lb.	
Matches and Vestas, 100 or less in a box	6d. p. gross of boxes	1/-	6d.
Brown Rock Salt ...	Free.	20/- per ton.	Free.
Condensed Milk ...	1d. per lb.	2d. per lb.	1½d. per lb.
Apparel <i>ad val.</i>	25 %	40 %	35 %
Blankets ... ...	15 %	30 %	25 %
Men's Boots ... ...	15 % <i>ad val.</i> or 20/- per doz. pairs.	35 %	30 %
Woollen Piece Goods	15 %	30 %	25 %
Lamps ... ...	15 %	25 %	15 %
Galvanised Iron ...	Free.	30/- per ton.	20/- p. ton.
Plaster of Paris ...	9d. per cwt.	1/- per cwt.	9d. per cwt.
Fancy Goods <i>ad val.</i>	20 %	25 %	20 %
Cycle Parts (detailed in the Act) <i>ad val.</i>	10 %	5 %	Free.
Bicycles ... ...	20 %	25/- or 30% whichever rate returns the higher duty.	20/- or 25 %
Rubber Tyres ...	15 %	25 %	20 %

\* Customs Tariff (South Africa Preference) Act, No. 17 of 1906.

ITEM.	Tariff in 1902.	General Tariff 1911	Tariff on Produce or Manufacture of U.K. 1911
Metal Pipes for Organs ...	Free.	Free.	
Pipe Organs ...	... 20 %	20 %	
Pianos ...	... £12	£14 or 35% whichever rate returns the higher duty.	£12 or 30 %
Stationery ...	25 %	30 %	25 %

The Federal Capital.

Canberra.

The Constitution Act placed (with certain restrictions) the final selection of a site for the Federal Capital in the hands of the Federal Parliament. But although the question was raised in the first Speech to Parliament by the Earl of Hopetoun and discussed from time to time, it was not till 1908 that the final decision was arrived at. Ballots had been taken in the Federal Parliament as early as 1903, but the two Chambers had failed to agree. A compromise was arrived at in the following year which, however, did not give general satisfaction. Consequently, in 1908, the question was re-opened, and eventually the district of Yass-Canberra was agreed upon. Nine hundred square miles of territory and an outlet at Jervis Bay were secured. On the 12th March, 1913, the foundation ceremony was performed, and the capital of Australia named Canberra.

Finance.

As already mentioned, the Braddon clause

of the Constitution compelled the Central Government to hand over to the States for the first ten years three-quarters of the net revenue obtained from customs and excise. Considerable anxiety was felt by the State Governments and Parliaments as to what return the States would get from this source after the expiration of the stated period. The Commonwealth Parliament came forward with a double-barrelled proposal on the lines laid down at a Premiers' Conference to the effect that (1) each State should receive in perpetuity a sum equivalent to twenty-five shillings per annum for every inhabitant in the State, and (2) the Central Government should be empowered to take over at any time the State debts,\* including the amounts incurred subsequent to the inauguration of the Commonwealth. These proposals required the sanction of the people, as they involved an amendment of the Constitution. The two questions were therefore submitted to a referendum in 1910, the result of which was to give power to the Federal Parliament to take over the debts as suggested, but to refuse them the right to fix for all time the allowance to the States at a per

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\* The Constitution allowed the Commonwealth to take over only that portion of the debts incurred prior to the establishment of Federation.

capita rate of twenty-five shillings.\* To overcome the difficulty, the Commonwealth Government arranged to pay this amount to the States for the next ten years. The permanent settlement of a much vexed question has, therefore, again been deferred.

\* This will be better understood from a study of the actual results of the poll. The Tables will also serve to make clear the conditions that have to be satisfied in order to secure a constitutional amendment.

*1. The Referendum on the proposed Constitution Alteration (Finance) Act.*

	Votes in favour of the Amendment.	Votes not in favour of the Amendment.
New South Wales ..	227,650	253,107
Victoria ..	200,165	242,119
Queensland ..	87,130	72,516
South Australia ..	49,352	51,250
West Australia ..	49,050	30,392
Tasmania ..	32,167	21,454
	645,514	670,838

*2. The Referendum on the proposed Constitution Alteration (State Debts) Act.*

	Votes in favour of the Amendment.	Votes not in favour of the Amendment.
New South Wales ..	159,275	318,412
Victoria ..	279,392	153,148
Queensland ..	102,705	56,346
South Australia ..	72,985	26,742
West Australia ..	57,367	21,437
Tasmania ..	43,329	10,186
	715,053	586,271

An analysis of these figures shows us that neither of the two conditions were satisfied in the poll on the first question; there was neither a majority of the total number of votes, nor a majority of the States in favour of the proposals. The States as States were equally divided on the question. On the other hand, the second table affords us an instance where both conditions are satisfied as to a majority of States (five to one), and a majority of voters were in favour of the alteration. Consequently the Finance proposal was rejected, but the State Debts proposal was accepted.

The modification of the clause dealing with Constitutional State debts is the only amendment that has Amendment. yet been effected in the Constitution except for a slight alteration made to synchronise Senatorial elections with those of the representatives in the other House. More recently, however, attempts have been made to increase the Federal powers in industrial matters, but though the two Bills passed the Federal Houses they were rejected at the referendum in 1911.\*

Another very important matter placed under Defence. Federal control is that of defence. When Sir John Forrest was sworn in as the first Minister of Defence in 1901, the military forces of Australia amounted to less than 29,000 men, and they were still further reduced to slightly over 20,000 in 1905. The administration, which had previously been in the hands of a General Commanding Officer and his staff, was then transferred to a Council of Defence to deal with questions of policy, and a Military Board to supervise the administration. In 1911 the voluntary system came to an end, and universal compulsory training, with certain specified exemptions, became the order of the day. The system finally adopted followed in its main features the recommendations made by Lord Kitchener of Khartoum, who had visited

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\* *Vide infra*, p. 225.

Australia to report on our defence system. By the Acts of the Deakin and Fisher Ministries (1909-11) boys of twelve and thirteen years of age undergo a course of drill and physical training (120 hours per year) as junior cadets; for the next four years (14-18) they become senior cadets, and undergo drill equivalent to sixteen days annually—eight days being spent in camp for continuous training. They are then passed on to the citizen forces (the militia), where, between the ages of 18 and 25, they undergo a similar amount of drill; and for the last two years (25-6) they are required to attend one muster parade each year. A day's drill was defined in 1911 as occupying not less than four hours, whilst two hours represent a half-day, and one hour satisfies for a night. All citizens between 18 and 60 are liable to be called upon to serve in time of war, men without family ties of wife or children being called into service in the first instance, and married men later if necessary. At the beginning of 1913 the Commonwealth forces numbered 34,000 militia and volunteers and nearly 90,000 senior cadets. In 1920 it is estimated there will be 128,000 militia and 100,000 senior cadets.

#### Naval Defence.

At the same time considerable change has been effected in the Naval Defence System. The Commonwealth Government has engaged to construct an Australian Fleet which will

constitute a "unit" of the Imperial Fleet. On the 1st January, 1913, the Imperial Flagship, H.M.S. Drake, set out on her return voyage to England, and one of the Commonwealth Fleet, H.M.A.S. Australia will take her place as the flagship. The first really Australian squadron is to consist of an armoured cruiser, three unarmoured cruisers, six destroyers and three submarines, with docks and depot ships to match; and is to be manned as far as possible by Australians. The administration is in the hands of a Naval Board. The annual upkeep is estimated at about £750,000. Military and naval colleges have also been established—the former at Duntroon, and the latter temporarily at Geelong, though a site for the permanent naval college has been chosen at Jervis Bay—and these are to provide the higher training necessary for officers. In January, 1913, the dock at Cockatoo Island (Sydney) was formally handed over to the Federal Government.

Amongst other important matters that have received the attention of the Commonwealth Parliament are the following:—

- (1) The enforcement of a "White Australia" policy.
- (2) The granting of bounties to encourage certain Australian industries.
- (3) The acceptance of the transference to the Commonwealth of the administra-

tion of Papua and the Northern Territory.

- (4) The imposition of a land tax.
- (5) The issue of Commonwealth Government notes and the establishment of a Commonwealth Bank.
- (6) The establishment of a Federal Industrial Court of Conciliation and Arbitration.
- (7) The appointment of a High Commissioner to reside in England, and the establishment of an Interstate Commission.

"White Australia."

(1) In respect to the first of these, the Commonwealth Government has from the very outset been intent on preserving Australia for the white races. The policy is based partly on moral, and partly on economic grounds. In the first Vice-regal speech to Parliament, reference was made to the necessity for restricting the immigration of Asiatics, and abolishing South Sea Islanders' labour. These matters the Parliament could control, since the Constitution gave them power to legislate in reference to immigration and emigration. Accordingly, the Immigration Restriction Bill was introduced by the Prime Minister, Sir Edmund Barton, in June, 1901, and eventually the law was passed by which every immigrant should be liable to be called upon to write fifty words in a European language. The Act was subsequently amen-

ded, and at the present time the dictation test may be in any language prescribed by Government regulation. As no such regulation has yet been issued, the test stands as agreed to in 1901. Owners and masters of vessels are now liable to a fine of £100 if a prohibited immigrant enters the Commonwealth from off their vessels. The Act is not enforced against Europeans, or against Asiatic visitors who do not intend to take up permanent residence in Australia, nor is it applied whenever the Commonwealth enters into an understanding with a foreign government for the admission of its subjects into Australia. In keeping with this restriction of undesirable immigrants, the Pacific Islands Labourers' Act was passed in *Pacific Islands Labourers' Act.* 1901 for the repatriation of the Kanakas who were employed mainly in the sugar fields of Queensland. Pacific Islanders could not enter the Commonwealth after March, 1904, whilst those already in the country might, after 1906, be deported by order of the Government. New Zealand natives (Maoris) were exempt from the operations of the Act.

In 1912 a measure, having as its object *Immigration Act of 1912.* an Australia healthy and protected against criminal influx, passed the Federal Parliament. This immigration Act prohibits the immigration of persons who cannot obtain a prescribed certificate of health, or are suffering from dangerous communicable diseases, or are otherwise physically or mentally feeble or deficient.

Any person who has within the preceding five years been in prison serving a sentence of one year or more for a criminal offence, is also forbidden to land.

**Sugar Bounty.**

(2) The granting of bounties on the production or export of goods is another matter of Federal concern, and the Parliament has used its power in this direction to ensure still more a "White Australia." A Bounties Act assisted the growers of sugar who had dispensed with coloured labour by granting them a rebate of excise duty. An excise duty equivalent to about sixty shillings per ton on manufactured sugar was imposed in 1902, and subsequently raised to eighty shillings (1907), but a rebate which worked out at about forty shillings per ton (or sixty shillings in 1910) was allowed on all sugar grown by white men. This really means that a duty of twenty shillings per ton on sugar manufactured by white labour was to be paid as against eighty shillings on the production of the coloured labourer. In 1912 both the bounty and the excise on sugar were abolished. The effect of the bounty is evident from an examination of the following statistics:—

**SUGAR PRODUCED IN THE COMMONWEALTH**

Season.	By White Labour.	By Coloured Labour.
1902- 3	... 31,688 tons.	67,107 tons.
1910-11	... 209,422 ,,	16,670 ,,

In addition to the bounty already mentioned Other Bounties, similar assistance is given to Australian industries in iron, wire, wire netting, combed wool, kerosene, and several other commodities. The tabulated list contains bounties that have been granted for limited periods during the last five years.

Item.	Amount and Duration of Bounty.
Agricultural Products, such as Cotton, Flax, Hemp ...	10/- for various periods from 5 to 10 years.
Rice ... ... ...	20/- per ton for 5 years.
Raw Coffee ... ... ...	1d. per lb. for 8 years.
Tobacco Leaf ... ... ...	2d. per lb. for 5 years.
Dried Fruits ... ... ...	10/- on market value for 5 years.
Pig Iron, Puddled Bar Iron and Steel, from Australian Ores ... }	12/- per ton until 30th June, 1914.
Galvanised Iron or Steel, Wire and Wire Netting, from Australian Ores ... }	10/- till 30th June, 1912
Kerosene ... ... ...	2d. per gallon till 30th June, 1913.
Paraffin Wax ... ... ...	2/- 6/- per cwt. till 30th June, 1913.
Combed Wool Exports ... }	1½d. per lb., 1909-11. 1d. per lb. for the first million pounds exported, ¾d. per lb. above that amount, 1912-15
Rock Phosphate ... ... ...	10/-
Wood Pulp ... ... ...	15/-

Federal Territories (3) The Constitution empowers the Federal Parliament to make laws for the government of any territory surrendered by any State and accepted by the Commonwealth, or of any territory placed by the Sovereign under the authority of, and accepted by the Commonwealth. In accordance with this, Papua was taken over on the 1st September, 1906. The communal rights of the natives were respected. Lands are not to be alienated, but leaseholds at a nominal rent are allowed. Similarly, upon the acquisition of the Northern Territory on the 1st January, 1911, it was decreed that no Crown lands should be sold or disposed of for any estate of freehold, unless a contract had been entered into prior to the transfer of the territory. The Central Government has taken over the loans incurred by South Australia in respect to the territory, and pays the interest thereon to South Australia. It has purchased the existing railway, and pledged itself to complete its construction so as to connect Darwin in the north with Port Augusta in the south. The Governor-General can issue ordinances having the force of law, and a Resident Administrator has been appointed with full powers of internal management. He is assisted by a Council of Advice of not more than six persons, meeting monthly. A Supreme Court has been established, and the South

Australian laws, together with certain Commonwealth laws, have been continued in force.

(4) For the first ten years of Australia's A Graduated federated existence it was assumed that the Land Tax. Federal revenue should come from the returns of its departments and through the channel of indirect taxation, the customs and excise. As a matter of fact, of the fifteen and a half million pounds of revenue collected in 1909-10, all but about £200,000—that is to say, over £15,300,000—was acquired from the customs, excise, and postal departments alone. However, in November, 1910, a fresh source of revenue was opened up by means of the Land Tax Act. The object of this Act is to make it "unprofitable to hold big estates;" in other words, it aims at bringing about closer settlement. The owners of land worth less than £5,000 (if not absentee) are exempted from taxation; those owning land worth between £5,000 and £10,000 are required to pay an annual tax of about one penny in the pound on the unimproved capital value; and the tax is so graduated, that those whose landed property exceeds £80,000 in value must pay as much as sixpence on every pound in excess of that amount. An extra tax equivalent to about one penny in the pound is imposed on absentee owners. As the Act has been in operation for less than three years, it is not advisable to discuss its effects on the large estates aimed at.

Commonwealth Notes.

(5) The Constitution gives to the Federal Parliament the power to make laws with respect to banking other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money, as well as currency, coinage, and legal tender. The Parliament has availed itself of this power to pass the Australian Notes Act (1910) authorising the issue of Australian notes from ten shillings upwards in value, redeemable in gold at the Treasury at the seat of Government. For the first £7,000,000 represented by notes there was to be a gold reserve of at least twenty-five per cent. of that amount. Beyond that, the Treasurer was required to hold pound for pound. But by an amendment in 1911, the gold coin reserve must not be less than one-quarter the amount represented by the Australian notes, and this applies to any sum whether less or greater than £7,000,000. On the 17th March, 1912, the Commonwealth Notes in circulation represented £9,431,980, and against this the Treasury held gold to the value of £3,885,044. Another Act followed which, by placing a ten per cent. tax on all notes issued by private banks, in effect prohibited their issue.

The Commonwealth Bank.

The Australian Notes Act was regarded as the first step towards the establishment of a Commonwealth Bank, and this institution in

due time appeared, transacting both ordinary and savings bank business. It was officially opened in January, 1913, and has already branches in nearly every business centre throughout Australia. It is controlled by a Governor who is assisted by a Deputy-Governor, both being appointed for seven years.

(6) The Commonwealth Governments have also shown considerable interest in industrial matters. In 1904 the Federal Conciliation and Arbitration Act provided for the establishment of a Court of Conciliation and Arbitration with one of the judges of the High Court, appointed for seven years, as the President. The expressed object of the Act was to prevent lockouts and strikes, to provide for the States a court to which they could refer their industrial disputes, and to encourage organisation of employers and employees' associations. Owing to the demands made upon the time of the President, a Judiciary Act of 1906 increased the number of judges on the High Court Bench\* from three to five, and it was still further increased to seven in 1912. The Court of Conciliation and Arbitration attends only to disputes extending beyond the limits of one State. It can fix minimum rates of wages and give preference to unionists.

Court of Conciliation and Arbitration.

\* The High Court itself was established by the Judiciary Act of 1903, and was given, in addition to the powers conferred in the first instance by the Constitution, original jurisdiction in all matters arising under the Constitution or involving its interpretation.

A desire to protect the wages of workers led to the passage of the Excise Tariff Act of 1906. The scheme outlined in this Act was known as "New Protection." It imposed excise on the manufacture of certain agricultural implements, and at the same time exempted from payment those employers who gave "fair and reasonable" remuneration to labour. Soon after its passage, a successful appeal for higher wages was made by one set of employees. But the High Court, when referred to, declared the Act unconstitutional and invalid on the ground that it was not a taxing Act, but one which, in effect would, interfere with the internal trade of the States, which was a matter purely for State administration.

**The Referendum of 1911.** Consequently, an attempt was made in 1911 to increase the powers of the Commonwealth with respect to (1) trade and commerce within a State, as well as interstate and foreign; (2) corporations; (3) labour and employment, including (a) the wages and conditions of labour and employment in any trade, industry or calling, and (b) the prevention and settlement of industrial disputes, including disputes in the State railway services; (4) combinations and monopolies in relation to the production or supply of goods or services. Furthermore, the Government sought to gain the power to make laws for carrying on any industry or business by or under Government control, and for





A. B. PIDDINGTON, K.C.  
*Chairman of the Interstate Commission.*

In August, 1913, the Federal Government decided the personnel of the Interstate Commission. Mr. Piddington was appointed as Chairman, and Mr. George Swinburne, a member of the Victorian Assembly, and Mr. N. C. Lockyer, I.S.O., Comptroller-General of Customs, as the other two Commissioners. The functions of the Interstate Commission are outlined on pp. 225-6.

acquiring <sup>at</sup> just terms any property used in connection with the industry whenever the Parliament declared it the subject of a monopoly. The proposals were submitted to a referendum on 26th April, 1911, but were rejected by both a majority of States and a majority of the total number of electors voting. Western Australia was the only State to approve of them. Somewhat similar proposals were again submitted to the referendum in May, 1913, and were again negatived.

(7) In the interests of the Commonwealth's commercial and financial connection with the United Kingdom, a High Commissioner Act was passed in 1909. The Act empowered the Governor-General to appoint a High Commissioner for five years (subject to re-appointment) to act as representative and resident agent of the Commonwealth in the United Kingdom, and look after the commercial, financial and general interests of both the Commonwealth and the States. Sir George H. Reid received the distinction of being Australia's first High Commissioner, and his settlement and work in England have proved of considerable benefit to the country he represents.

More recently (1912) Parliament passed an Act defining the powers of the Interstate Commission. The Act provides for three Commissioners (the chairman to receive

£2,500 per annum, and each of the other two, £2,000). The duties of the Commission are to investigate matters affecting production and trade, the encouragement of Australian industries, the opening up of external trade, the effect of alterations in the tariff, prices of commodities, wages, profits, labour and unemployment, foreign bounties on Australian imports, immigration, questions relating to the navigability of rivers, and the conservation of river waters for irrigation purposes, and other matters referred to it by Parliament. The Commission has powers to adjudicate on disputes relating to inter-state or external commerce, to fix maximum and minimum rates for services, and to enforce the attendance of witnesses before it. The same Act forbids State railway authorities to give any preference or discrimination which may be considered as unreasonable or unjust to any State in matters affecting inter-state commerce.

## CHAPTER XI.

### ANCIENT AND MEDIAEVAL SYSTEMS.

We have now examined the conditions for, and the leading general characteristics of, federal systems; we have observed the development of the federal movement in Australia, and discussed the main features of her Constitution. It remains, as an aid to the more complete understanding of this Constitution, to proceed to an examination of other federations that have been established both during and since ancient times. This we purpose to do, touching lightly on the earliest systems, and somewhat more fully on those established within the last century and a quarter, since it was in the light of the experience of the latter that the Australian system was framed. The reader will then be in a position to note interesting resemblances and contrasts between these systems and that of the Commonwealth. Nor should he fail to observe how closely the general fundamental principles have been adhered to in every case.

The most important federal or confederate

Past and Present Systems in existence at various times during the past 2,400 years are the following:—

- (1) The leagues of ancient Greece, such as the Delian, Achaean, and Aetolian.\*
- (2) Various leagues in ancient Italy, especially the Latin League.
- (3) The mediaeval German Empire, better known as the Holy Roman Empire.
- (4) The Swiss League.
- (5) The Seven Provinces of the Netherlands
- (6) The United States of America.
- (7) Switzerland since 1848 and 1874.
- (8) Canada.
- (9) Germany.
- (10) Australia.

The Union of South Africa also may be regarded as containing features that approximate to those of a federation.

The Confederacy of Delos. An early attempt at a union of a more or less federal nature was the so-called Confederacy of Delos, founded in 477 B.C., just after the Greeks had emerged triumphant from their struggle against the Persians. The league was formed for the purpose of presenting a united front against any further aggression, and liberating the Greek cities still under the foreign yoke. It included the cities of Ionia and Aeolis on the western coasts of Asia

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\* In addition to those mentioned above, federal governments of a less developed character were in operation in Thessaly, Boeotia, Acarnania, Olyntium, Arcadia and Lycia, *vide* "Greenidge's Handbook of Greek Constitutional History," p. 222.

Minor, the cities of Chalcidice, the Hellespont, and the Bosphorus, and almost every island in the Aegean Sea, together with the city of Athens itself. A representative congress was to meet annually at Delos, where the common treasury was kept, and each State was to retain its independence and equality of status. The Congress acted as a common court of justice, and exacted obligations from the individual cities. Thus the deliberative and judicial powers of the Confederacy were exercised by the cities conjointly, though the chief executive authority was in the hands of Athenians.

The great preponderance of Athens in the exercise of the executive functions prevents the Delian Confederacy from being considered amongst those of true federal type. The league was shortlived, as, owing to the vastly superior power and prestige of Athens, the Congress ceased to meet, and the treasury was removed to Athens, while the islands and cities within the league gradually lost their freedom and became dependencies of the sovereign city. The Delian Confederacy was transformed into an Athenian Empire.

About two centuries later, the nearest approach to a successful federal union in ancient times was made, when the cities of Achaea formed a league (280 B.C.). This federation, consisting originally of ten cities

The Achaean League.

of Achaea, embraced ultimately all the cities but three of the Peloponnesus outside Sparta and Elis. The object of the city States in the league was to release the Peloponnesus from Macedonian control and recover their independence. The characteristic Greek primary assembly, or meeting of all the free citizens over the age of thirty years, was retained, but the federal magistrates selected by this body practically governed the country. Just as in England, the moot or meeting of all the citizens gradually gave place to representative institutions, so, owing to the inconvenience of assembling in one central city, the populace left the government for the greater portion of the year to their representative magistrates, of whom the chief was the Strategus (a commander in both military and civil matters). The equality of the States was maintained by the citizens voting in their assemblies by cities and not as individuals. The matters to be presented to the Assembly were selected and prepared beforehand by another body of representatives known collectively as the Senate. Both the Senate and the Executive Magistrates had to carry out the will of the Assembly, and render an account of any acts performed without the authorisation of the Assembly at its previous meeting. In short, a system of responsible government, but differing in character from that with which we are familiar,

was in operation. The league constituted a real federation, in that an actual division of powers was arranged. A league court was also established, and its members appointed by the Assembly, for the purpose of settling internal disputes between the city-States. The local State bodies retained control of matters of purely local interest, whilst such matters as coinage, weights and measures, as well as defence, were left to the central body. It was this unusual circumstance that caused Polybius to write, "The whole Peloponnesus differs from a single city only in the fact that its inhabitants are not included within the same walls." After a hundred and fifty years of good government, the league was broken up in 146 B.C., when Achaea became a Roman province.

To the same period also belongs the Aetolian League. This was a loose confederacy formed of the tribes of Central Greece in which the supreme federal authority was vested in a Diet (the Panaetolicum) consisting of all free-born Aetolians. This body attended to matters of war and peace, alliance, treaties and the reception of ambassadors, and met annually at the central city, Thermon. It elected annually the Strategus and officers, as well as another body or committee (the Apocleti) which was invested with supreme judicial authority, and attended to the details of administration.

The Aetolian League.

In all probability the league ultimately embraced in addition to Aetolia, the territories mastered by the Aetolians—*i.e.*, Locris, Phocis, Boeotia, Messenia, and portions of Thessaly, Epirus and Acarnania,\* together with a few cities of the Peloponnesus and a few of the Aegean Islands.

**The Latin League** In ancient Italy federations existed before the days of Rome's greatness. The most important, perhaps, was the Latin League of thirty cities or cantons, with Alba at first, and Rome later, as the leader. The league suffered the same fate as the Delian League, and became subject to the dominion of Rome.

**The Hanseatic League (Commercial.)** In mediaeval times, again, cities came together either to secure commercial privileges or for protection. The most striking instance was the Hanseatic League, to which at one time the merchants of nearly one hundred cities belonged. It was formed purely for mercantile purposes, and in its most rosy days monopolised almost the whole trade of northern Europe. Politically, however, the cities in the League remained attached to the Empire, and formed neither a federation nor a confederation.

**The Holy Roman Empire.** The Holy Roman Empire itself may be regarded as an example of a Staatenbund or

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\* Polybius referring to the towns over which Aetolia exercised a protectorate, says: "These cities unwillingly shared in the Aetolian confederacy." See Greenidge's "Handbook of Greek Constitutional History," p. 233.

Confederation. Under Charlemagne the government had become strongly centralised. But, owing to the privileges and charters granted to various cities, ecclesiasts and turbulent barons, a number of petty sovereignties subsequently developed within the Empire. Eventually almost the only indications of any confederate connection were the nominal acknowledgement of the existence of a federal Diet representing the governments of the various States, and the occasional election of a Roman Emperor whose authority was infinitesimal. So weak indeed did the central power become, that towns oftentimes formed little confederations or leagues amongst themselves for protection against the violent and oppressive princes and barons.

A very interesting instance of the formation of a federal union is the "Everlasting League" formed in 1291 by the three Swiss "Forest Cantons" of Uri, Schwyz, and Unterwalden. Their motive was to present a united opposition to the demands of the feudal counts of Hapsburg, or to protect themselves against disturbance within the Empire. The "Everlasting League" was so called from the agreement between the three members that "These regulations for the common welfare and safety, shall, with God's help, endure for ever, and in evidence of this determination, there has been prepared, at the wish of those hereinafore

The "Everlasting League" of Switzerland.

mentioned, a document strengthened with the seals of the communities and valleys herein-named." Between 1332 and 1353, "five other cantons, including Lucerne, Zurich and Berne, were added. Ultimately (1513), it became a "League of the Thirteen Places." A peculiar feature was that the new members were leagued with the three original States, but not necessarily with one another. The Federal Diet of this League had but consultative powers and no real authority. It was merely "an assembly of ambassadors with powers very strictly limited by their instructions." There was no central executive. The interest in this Confederation or Staatenbund lies in the fact that it formed the basis of the more complete system of later Switzerland.

**The Netherlands.** The Confederation of the "Seven United Provinces of the Netherlands," formed in 1579, is, perhaps, the best instance of a federal union in the early modern period. Originally possessions of the Duke of Burgundy, these provinces, together with ten others, had by reason of royal marriages passed into the hands of the Spanish Monarchs. The persecution of Protestants, and the establishment of the Inquisition, developed a spirit of resistance in the Netherlands, and in 1579, at Utrecht, seven provinces, of which Holland and Zealand were the chief, drew together in a Confederation or Staatenbund, known as the Seven

United Provinces of the Netherlands. The union was to be perpetual, but State rights were protected, it being agreed that each province should "retain its particular privileges, liberties, laudable and traditional customs, and other laws," and that the ancient constitutions of the cities and provinces should be preserved. The questions of defence, war and peace, foreign treaties, and currency were definitely set down as matters to be controlled by the "generality" of the Union. A federal revenue was also provided for. An Estates-General was created, but at first had little power, for the lack of a federal executive. This was subsequently remedied by the Estates-General securing the power to elect a small council to exercise executive authority. The votes in the Estates-General were counted according to States, and not according to individuals. A simple majority of State votes was sufficient on ordinary occasions to carry a proposal, but unanimity was required on questions of peace or war, the admission of new members, or the amendment of the Constitution. Consequently the Constitution was of the most "rigid" type. This was a decided drawback, and often rendered legislation impossible. Two other defects are also noticeable. (1) The Assembly consisted virtually of envoys of the Provinces bound by their instructions, and not of

representatives of the people. Consequently, and as the voting was by States, (2) provincial feeling or local patriotism remained tense, and precluded the development of a strong national sense. The provinces could not sink their differences or forget their rivalries.

**Ancient and Modern Federations compared.**

The earlier confederations or federations differ in several important respects from more modern systems. In the first place, representative government, where not entirely absent, was but partially evolved, whilst the problem of reconciling the conflicting interests of the larger and smaller cities or States remained unsolved. But, by what we may call a fortunate accident of evolution, the modern world has been offered the bicameral system, so excellently adaptable to federal schemes. For, as frequently pointed out, it allows a most effective and satisfactory compromise between the conflicting principles of proportional representation (*i.e.*, representation in proportion to population) and equality of States in representation. Secondly, the earlier federations had to do with city-States or small territories; whereas to-day immense territorial States combine, and form more immense nations, continental in their dimensions. Thirdly, both in purpose and machinery the systems of the ancient and mediaeval world were simple. Modern systems are

complicated, since provision has to be made for uniformity in a greater number of matters, sovereign powers for the central body, preservation of State and Federal rights, and the direct dealing of the Federal Government with the people as an entity more or less apart from State boundaries.

## CHAPTER XII.

### THE UNITED STATES.

The Continental  
Congress.

In the year 1775, thirteen British colonies in North America revolted against the tyrannical colonial system of the mother country, and in the following year declared themselves independent. For the next five years the States remained leagued together with but an apology for national government in the "Continental Congress." This body, consisting of delegates sent by the various State Legislatures, had no defined powers; it had no jurisdiction and no constitutional means of securing a revenue. It was utterly dependent on the charity of the States. A slight advance was made when the thirteen States ratified the

The Confederation  
and Perpetual  
Union.

"Articles of Confederation and Perpetual Union." This Constitution was operative from 1781 to 1787. A few additional powers were vested in a Congress, the delegates to which were chosen annually, and voted by States. But even then the position was unsatisfactory. No powers of taxation were vested in the Congress, no legislation on questions of im-

portance could be effected without the consent of at least nine States, and no amendment of the Constitution without absolute unanimity. The federal body had no direct dealings with the citizens, and no direct control over them. Consequently the first few years of the Union seemed destined to be its last. Local patriotism or provincialism asserted itself strongly in a determination to maintain State sovereignty on all occasions and guard jealously against any independent act on the part of the Congress. Each State wished to reserve for itself the right to coin, levy taxes, control tariffs, raise armies, and maintain authority that would be better in the hands of a federal executive. An appeal to the States for 6,000,000 dollars to meet the national debt provoked the poor response of 1,000,000 dollars. The trend of events seemed to be towards inevitable dissolution of the Confederation. Washington complained that "the disinclination of the individual States to yield competent powers to the Congress for the Federal Government, their unreasonable jealousy of that body and of one another, and the disposition which seems to pervade each of being all wise and all powerful within itself, will, if there is not a change in the system, be our downfall as a nation."

In 1787 the Philadelphia Convention met to revise the Articles of the Confederation, but, exceeding its instructions, drafted an entirely

new Constitution, allowing for more complete federal legislative, administrative and judicial powers, a federal revenue, and direct dealing of the federal bodies with the people. It further resolved that the acceptance of the revised Constitution by nine States should bring the Union into existence. The new Constitution was finally adopted in 1788, by the requisite number of States; and in April of the following year (1789), Washington was unanimously chosen President, with John Adams as Vice-President.

**The Revised Constitution.**

The Constitution of the United States is especially interesting as the first of the modern constitutions and the basis of nearly all subsequent federal drafts. At the time it was thought to be a copy of the British Constitution, with an elected President substituted for an hereditary monarch. In accordance with the resolution of the 1787 Convention that "A National Government ought to be established, consisting of a supreme Legislature, Executive and Judiciary," the Constitution allowed for a President, two Houses of Legislature and a Supreme Court. The first body was to make the laws, the second to administer them, whilst the third ultimately tested their validity by the touchstone of the Constitution.

We will now proceed to a closer inspection of the Constitution.

## I.—THE EXECUTIVE.

The Executive power is vested in the President.  
President, assisted by a Vice-President. The former must be a native-born American, at least thirty-five years of age, and must have resided within the States for fourteen years.\* He is elected for a term of four years and may be re-elected. His position is equivalent neither to that of a European monarch, nor to that of a Prime Minister, and yet in some respects he resembles both. He has personal powers far exceeding those of an English monarch, though he is restricted by constitutional limitations. These limitations are as follows:—(1) He can make treaties only with the concurrence of a two-thirds majority of the Senate; (2) his appointments of Ambassadors, Public Ministers, Consuls, Judges and other public officials are subject to the advice and consent of the Senate. With the exception of these limitations, and the possible nullifying of his veto by special majorities in Congress, the President's personal will prevails. He resembles a Prime Minister in that he is the head of a Cabinet, but is unlike him in that he is independent of Parliamentary control or censure. Responsible government, as we understand it, is non-existent in the United

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\* The last-mentioned condition was to ensure that only one who was a citizen at the time of the outbreak of the Revolution in 1775 should occupy the Presidential Chair. It is now practically inoperative.

States. For though there is a Cabinet, it is rendered cohesive neither by a joint or corporate policy, nor by collective responsibility. The Ministers are so many Secretaries selected by the President and dependent on him for their continuance in office, whilst he is free to accept or reject their advice as he pleases. He is not even bound by their unanimity on any question. Moreover, this administrative body is entirely separated from the Legislature by the clause in the Constitution which states that "No person holding any office under the United States shall be a member of either House during his continuance in office." Even nullification of the President's veto by the Congress is not regarded as an adverse vote or motion of censure necessitating his resignation.

The President is the Commander-in-Chief of the military and naval forces, and, as such, has the power to control the officers, and require their advice when he desires. He is also empowered to reprieve or pardon in all cases except that of impeachment. He convenes and adjourns the Congress, but cannot dissolve either House, since the absence of Presidential or Ministerial responsibility to the popular representatives in Parliament does not necessitate an appeal to the country when differences of view or policy arise. He can be removed from office only after impeachment for, and

conviction of, treason, bribery, or some other high crime.

That the complete separation of the executive and legislative bodies was intentional is evident still more evident on an examination of the method of electing the President. Neither the House of Representatives nor the Senate can directly influence the election in the first instance. The President is chosen by Electors specially selected for the purpose. Each State appoints Electors in the manner laid down by the State Legislature. They equal in number the total number of Representatives and Senators representing the State in Congress. Care is taken that no Elector is a Senator or Representative. The Electors of each State then proceed to vote for President and Vice-President, one of the citizens proposed by each Elector being a resident of another State. The results are forwarded by each of these electoral bodies to the President of the Senate, who counts the votes in the presence of the assembled Senators and Representatives. The candidate securing an absolute majority of votes polled is declared elected; but should no candidate obtain such a majority, the House of Representatives selects one from the three most favoured candidates, each State having one vote. Two-thirds of the States must be represented to constitute a quorum for the occasion, and a majority of the total number

of States is essential for the return of any candidate.

If the House of Representatives fail to choose a President, the Vice-President acts as President. The Vice-President is elected similarly, except that the Senate is substituted for the House of Representatives when the Electors' vote is indecisive, and it selects from the two highest candidates on the list. This indirect method of electing the President has not avoided the disadvantages of party faction involved in a direct popular vote, as the founders of the Constitution had intended.

## II.—THE LEGISLATURE.

### The Constitution of Congress.

The Congress or Parliament consists of the Senate and the House of Representatives. The latter body is composed of members chosen biennially by the citizens properly qualified as State electors. The representation is on a population basis, each State having one representative for every 30,000 inhabitants, with a minimum representation of one. This House is consequently regarded as the *National House*. The Senate consists of two Senators from each State. They are chosen by the State Legislatures and hold office for six years, though it is so arranged that one-third of the members retire every two years. No State may, without its own consent, be de-

prived of equal representation in the Senate. Hence it may be called the *States' House*. As it takes six years to alter completely the *personnel* of the Senate, some assurance is given of reasonable continuity of policy, or at least some security against radical changes. A Representative must be at least twenty-five years of age, and have resided in the United States for seven years, whilst a Senator's minimum age is thirty years, and his length of citizenship nine. Both must be residents of the State they represent.

The main virtue of these arrangements for the bicameral system of the Legislature to <sup>The Virtue of a</sup> <sup>Bicameral Fed-</sup> <sup>ral Legislature.</sup> federal conditions. Whatever may be said of the system in unified countries, it is indisputably an admirable contrivance for federated States. For it provides a means of reconciliation between two principles which invariably clash whenever States contemplate federal union. The smaller States insist on the equality of States, whilst the larger ones declare in favour of the equality of citizens. The former principle involves the equal representation of States in the federal assemblies, whilst the latter requires representation in proportion to population. The problem is, therefore, "to reconcile the claims of the larger States to predominance with the claims of the smaller

States to equality." But with two legislative chambers to fall back upon, neither principle need be thrown overboard. In America, the Senate is the embodiment of the principle of State equality, whilst the members of the House of Representatives are chosen on a population basis. . . . "The device by which they adapted this system to the federal idea—making one representative of the States, the other of the Nation—is one of the crowning triumphs of their work."<sup>\*</sup>

It is now clear that a Federal Parliament is not an exact reproduction of the British Parliament. They are alike in that the two Chambers in each case act as a check on one another; but, whereas in Great Britain it is a nobility checking a democracy, under a federation it is State interests being safeguarded against the interests of the largest cluster of citizens. The only occasion on which such a safeguard might reasonably be protested against would be when the internal policy or interests of a State were being unduly disturbed by the Federal Legislature.

Congress assembles at least once every year, and members of both Houses are paid. As the principles of "Responsible Government" are inoperative in the United States, the personnel of the "National House" is changed at regular intervals of two years, and is not sub-

The Powers of  
Congress.

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\* Garran, "The Coming Commonwealth," p. 60.

ject to premature or unexpected alteration. The powers of the two Chambers in respect to the initiation of legislation are similar, except that revenue bills originate in the House of Representatives. These bills, however, are subject to amendment by the Senate. Moreover, the latter body, as a natural consequence of certain special powers conferred on it, is in reality the dominant House. The Ministers, for instance, chosen by the President, must be approved of by the Senate, which body has also the sole power of ratifying or rejecting treaties made by the President with other Powers. In other words, certain administrative rights have been vested in this legislative body. On the other hand, a legislative right rests with the President in that a bill ordinarily requires his approval and sanction in order to become law. But, should he exercise his right of veto, the Congress can nullify it by repassing the bill with a two-thirds majority in each Chamber. The House of Representatives has the sole right of impeachment, and the Senate the sole power to try all such cases, though its powers of punishment are restricted to removing the convicted person from office and disqualifying him from any government office. The two Chambers select their own officers, except that the Vice-President of the United States is President of the Senate *ex officio*. No provision has been

made in the Constitution to overcome deadlocks.

Separation of  
Legislature and  
Executive.

Ministers, as already pointed out, cannot sit in either chamber. Consequently, there is no Ministerial leadership of Congress to conduct legislation or be responsible for it. Congress flounders through its business by distributing the various questions demanding attention amongst a number of Standing Committees. The effect is to destroy the unity of legislation. One committee, for instance, is concerned with the raising of revenue; another with the expenditure. As the two committees do not have joint sittings, and the spending authority—the Executive—is represented on neither, the results do not always harmonise.

### III.—THE DIVISION OF POWERS.

Federal and State Powers. The Constitution of the United States provides for the distribution of powers between the National and State bodies in such a way that the federal powers are defined and limited, whilst the individual States have jurisdiction over all matters not specifically mentioned. The sovereignty of each is absolute within its own sphere, though where they have concurrent powers the State must give way to the Nation. Both deal directly with the citizens, except that Senators are chosen by

the State Legislatures. It is this direct commission from the people, and direct control over them by means of the federal courts, that differentiates the Federation of 1788 from the Confederation of 1781, and prevents the later one from being a hopeless and disastrous failure such as the earlier union was. But whilst it is the larger body that impresses the imagination of the world, it is the smaller bodies that control nearly all the minutiae of the citizen's life. In the words of Garran, "the citizen has a double allegiance—to his State and to the Nation. It is the latter allegiance which appeals more strongly to his sentiment, and which must prevail where the two conflict; it is the former which comes closer to his everyday life."\*

Amongst the matters controlled by the Federal Government are: Customs and excise, the army and navy, foreign and interstate commerce and trade with the Indians, the postal system, coinage, copyrights, weights and measures. But its powers are specifically limited in certain respects. The National Government cannot, for instance, tax exports, or give commercial preference to the ports of one State over those of another. It cannot grant titles of nobility or pass a Bill of Attainder or *ex post facto* laws, or suspend the right of Habeas Corpus in times of peace, or expend

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\* Garran, "The Coming Commonwealth," p. 69.

unappropriated moneys. The States, too, are definitely prohibited from making treaties or alliances with another State or a foreign power, or coining money, or engaging in war except when invaded, or granting titles of nobility or impairing the obligation of contracts.

Finance.

As regards finance, the Federation and the States are absolutely unconnected. The federal revenue is derived chiefly from customs, excise and postal revenues. There is practically no direct taxation levied by Congress, for two reasons:—(1) Only such capitation and direct taxes are constitutional as are laid in proportion to the census, and this is difficult; (2) the federal revenue has always exceeded federal requirements, thereby rendering further sources of revenue unnecessary. The States unfortunately are not in such a happy position, but there is no constitutional arrangement by which a federal surplus can be applied to adjust State deficiencies; and, though on one occasion the Congress did hand over a large balance, it was purely a voluntary act by which it relieved itself of an embarrassing surplus.

#### IV.—THE JUDICIARY.

The Federal Court.

The division of powers between the Nation and the States involves a device by which con-

flicts between these powers may be decided. Such powers of decision rest with the Federal Supreme Court. In England, a court obeys an Act of Parliament, and when discrepancies arise between different Acts, it obeys the latest one to the extent to which it invalidates previous Acts. But in America, the Constitution is supreme, and the courts obey an Act of Congress or a piece of State legislation only so far as the latter is not inconsistent with the former and neither in conflict with the Constitution. This document does not explicitly state that the Federal Court is the "Guardian of the Constitution," yet it gives to it judicial powers extending to those cases amongst others to which the United States are a party. This jurisdiction, together with the principle "that any act done by an agent in excess of his authority is void," is sufficient for the purpose. In interpreting the law, it does so in the light of the Constitution, and if there is any antagonism, the law is invalid to the extent of its conflict with the Constitution. The Federal Court has jurisdiction in cases affecting ambassadors, public ministers, and consuls, in cases of admiralty and maritime jurisdiction, and in controversies between two States or in which the United States are a party. It originally had control of cases between one State and the citizens of another or of a foreign State, but by an amendment does not explicitly state that the Federal Court is the "Guardian of the Constitution," yet it gives to it judicial powers extending to those cases amongst others to which the United States are a party. This jurisdiction, together with the principle "that any act done by an agent in excess of his authority is void," is sufficient for the purpose. In interpreting the law, it does so in the light of the Constitution, and if there is any antagonism, the law is invalid to the extent of its conflict with the Constitution. The Federal Court has jurisdiction in cases affecting ambassadors, public ministers, and consuls, in cases of admiralty and maritime jurisdiction, and in controversies between two States or in which the United States are a party. It originally had control of cases between one State and the citizens of another or of a foreign State, but by an amendment

ment of the Constitution, this right was withdrawn from the Federal Court. Although its jurisdiction is both original and appellate, it differs from the High Court of Australia or the Supreme Court of Canada in that it is not a court of appeal in cases where the citizens of one State only are affected. The judges are rendered independent of political influence in the customary way, *i.e.*, they continue to hold their office during good behaviour, and the remuneration cannot be diminished during their term of office.

#### V.—AMENDMENT OF THE CONSTITUTION.

Amendments  
already effected.

The Constitution of the United States is emphatically "rigid." Although provision is made for amendment, yet it is so difficult to secure the necessary compliance with stated conditions, that in 120 years the Constitution has been modified on three or four occasions only. The first ten amendments are known as the Bill of Rights, and, as they were added immediately after the Constitution, they may be considered as part of the original measure. These amendments safeguard the liberty of citizens. They secure for them religious freedom, freedom of speech and of the press, freedom to assemble and petition, freedom from having soldiers forcibly quartered on them in time of peace, trial by jury, etc. Of the re-

maining five amendments, three were accepted in the years immediately following the Civil War, by which slavery was abolished, and the franchise extended to all, regardless of race or colour. The difficulty of amendment lies in *The difficulty of the degree of unanimity required.* Amend-  
ment. Amendments may be proposed by a two-thirds majority of both Houses, or by a Convention called together as the result of an application of the Legislatures of two-thirds of the States. The proposed alterations must be ratified by at least three-fourths of the States through their Legislatures or Conventions. The proposals are not submitted directly to the people. No amendment infringing the right of a State to equal representation in the Senate can be passed without the consent of the State concerned.

## CHAPTER XIII.

### THE DOMINION OF CANADA.

Canada 1763-  
1840.

Canada was originally a French colony, but as a result of the Seven Years' War, its administration passed into English hands in 1760. For the first fourteen years it remained under military rule; then in 1774 the Quebec Act was passed, by which the French Canadians were allowed to retain their own civil law, Roman Catholicism became the officially recognised religion of the land, and the executive power was placed in the hands of a Governor, assisted by a nominated Assembly. General satisfaction with this Act accounted for Canadian loyalty during the American War of Independence, as well as for the great stream of immigration of the U.E. (United Empire) loyalists from the United States. These new-comers settled down partly in Nova Scotia and New Brunswick,\* but principally in Ontario. Since they were of British nationality, their advent disturbed the homogeneous character of the people of

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\* Nova Scotia had received a bicameral legislature in 1758. Prince Edward Island in 1773, and New Brunswick in 1784.

Canada, and necessitated a further constitutional change. This was effected by the Canada Act of 1791, by which Upper Canada (Ontario) and Lower Canada (Quebec) were constituted separate colonies.

Increased legislative powers were given to each through the introduction of elective Assemblies. "England in this way recognised that Canada contained two nations which could not as yet amalgamate."\* The administrative powers remained still with the nominated council; in other words, legislative powers without responsible government had been granted by this Act. The friction that arose between the popular assemblies and the non-representative executives which the former could not in any way control, together with racial antagonisms and land troubles, resulted in the rebellions of 1837, and the despatch from England of Lord Durham as High Commissioner to investigate the trouble. Acting on his advice, the British Government took two important steps: (1) The Outcome of the two Canadas were politically re-united by the Re-union Act of 1840, and given a common Legislature; (2) the colony was granted within the course of the next few years the full measure of responsible government. The nominated executive was transformed into an

The Outcome of  
Lord Durham's  
Report.

\* Woodward, "Expansion of the British Empire," p. 253.

executive Ministry, dependent on the Legislative Assembly, and thus arose "that form of complete self-government under which the unity of the Empire is reconciled with the practical independence of its daughter communities."\*

The recurrence of racial trouble between the settlers of Upper and Lower Canada, together with the growth of other settlements, showed clearly that the last word on constitutional arrangements had not been spoken. Complete unification proved very unsuitable, and in 1867 the Imperial Parliament, acting on the expressed desire of the Canadians themselves, passed the British North America Act. By this, Ontario and Quebec were first separated into two distinct provinces, and then, together with New Brunswick and Nova Scotia (which had received responsible government in 1848), were re-united in federal bonds. "The Federation of Canada was due . . . to the desire of the people united in one of the component colonies to separate, or at any rate to be less closely united."† The remaining portions of British North America (with the exception of Newfoundland, which prefers to remain unattached) have since been admitted into the Federation—Manitoba in 1870.

**British North  
America Act—  
1867.**

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\* Woodward, "Expansion of the British Empire," p. 256.

† Teece, *A Comparison between the Federal Constitution of Canada and Australia*, p. 5.

British Columbia in 1871, and Prince Edward Island in 1873; whilst five years later an Imperial Order-in-Council annexed all British territory (Newfoundland excepted) in North America to the Dominion. British Columbia was persuaded to enter the federal union by the undertaking of the Dominion Government "to secure the commencement, within two years from the date of the union, of the construction of a railway . . . to connect the sea-board of British Columbia with the railway system of Canada, and further to secure the completion of such railway within ten years from the date of such union."

The Provinces under the Dominion at The Dominion present are Ontario and British Columbia, with Provinces. Legislatures of a single chamber; Quebec, Nova Scotia, with ordinary double-chambered Legislatures; Manitoba, which had the usual two chambers until 1876, when it abolished its Legislative Council; New Brunswick, with two elective chambers until 1891, and Prince Edward Island similarly constituted prior to 1893, since when both have contented themselves with the Legislative Assembly. In 1905 two new provinces—Saskatchewan and Alberta—were carved out of the north-west territories, each with a Lieutenant-Governor and single-chambered Legislature. The north-west territories are governed by a Commissioner and a Council of four nominees of the

Governor-General, whilst the Yukon territory has, in addition to its Commissioner, an Executive Council of ten members elected by the people.

Proceeding to an examination of the nature of the Canadian system, and adopting the divisions employed in the survey of the Australian Constitution, we shall find that the 1867 Act provided for an Executive, a Legislature, Division of Powers between the Federal and Provincial Parliaments, and a Federal Judiciary.

#### THE EXECUTIVE.

The Governor-General.

The Federal Executive power is vested in the English Sovereign, and is exercised by the Governor-General, who both represents the Imperial authorities and plays the part of the Constitutional Ruler of Canada. As Constitutional Ruler he has the power to summon, prorogue, or dissolve Parliament; as both Constitutional Ruler and Imperial Representative he assents to, vetoes, or reserves for the royal consideration, the various measures presented to him by the Dominion Parliament. He is assisted by a Privy Council, which in theory consists of past and present Ministers; but, inasmuch as ex-Ministers' positions are purely nominal, the only effective part of the Privy Council is the existing Ministry. In

pursuance of the principles of responsible government the real Executive are the Ministers themselves, whilst the Governor-General governs in accordance with the advice they tender him. This advice in turn is ultimately in accord with the wishes of the nation expressed in Parliament, since the Ministry itself is merely a committee of certain members of Parliament who hold office just so long as they possess the confidence of the majority of members in the Lower or popular House. The business of administration is divided amongst departments, each with a Ministerial head, who, of course relinquishes office along with his colleagues the moment changes in the Parliament cause them to lose the support of the majority. In other words, the British system of responsible government is in full operation in Canada. Consequently, the probability of conflict between the Executive and Legislative bodies, which is so real in the United States where the two are practically independent of one another, is removed by the dependence of the Ministers on the good-will of Parliament.

The federal sentiment is sufficiently strong to demand proportional representation of the provinces in the Privy Council of the Dominion, although the Constitution itself does not require it.

## THE LEGISLATURE.

The House of  
Commons.

The Canadian Legislature consists of two Houses—the Senate and the House of Commons. The latter may be called the National House, because it represents the people directly. It thus corresponds to the House of Representatives in Australia. Each State in the Union is represented in this House in proportion to its population. The number of representatives for Quebec is fixed at sixty-five, and the number of members elected from each of the other provinces bears the same ratio to that number as its population bears to the population of Quebec. The total number of members, therefore, varies slightly from time to time. There will be a greater number of members when the other provinces grow more rapidly than Quebec, but a smaller number when Quebec advances more rapidly than they. In 1867 the Commoners were 181 in number, of whom 65 came from Quebec, 82 from Ontario, 19 from Nova Scotia, and 15 from New Brunswick. Since 1902 the strength of the House of Commons has been 221 members. Of these, Quebec is represented by 65, Ontario 86, Nova Scotia 18, New Brunswick 13, Prince Edward's Island 4, Manitoba 10, Saskatchewan 10, Alberta 7, British Columbia 7, and the Yukon territory 1. After 1916 the aggregate number will be raised to 231, but it

is significant of the westward movement of the population that the combined representation of the eastern provinces (Ontario, Nova Scotia, New Brunswick and Prince Edward Island) will be reduced by 9, whilst that of the western provinces (Manitoba, British Columbia, Alberta and Saskatchewan) will be increased by 19.\* Members of the House of Commons are elected for a term of five years, though, according to British constitutional practice, the House is liable to dissolution at any time.

The Senate is generally regarded as the States' House, as it is supposed to safeguard the interests of the individual Provinces. Now, the ideal "States' House" should represent the various Provinces equally, and should be elected either by the people themselves, or at any rate by the Legislature of the Provinces. But it is because neither of these conditions is satisfied that the Canadian Senate performs the function of a States' House very imperfectly. In the first place, the members are chosen neither by the people nor by the Provincial Legislatures, but by the Governor-General. Moreover, they are appointed for life; and, even assuming they were representative of Provincial views at the time of

*Imperfect recognition of State Equality.*

\* The distribution of representatives in 1916 will be as follows:— Quebec, 65; Ontario, 82; Nova Scotia, 16; New Brunswick, 11; Manitoba, 15; British Columbia, 11; Prince Edward Island, 3; Alberta, 12; Saskatchewan, 15; Yukon Territory, 1.

their appointment, they may cease at any moment to be in that happy position, when any decided change of opinion takes place within the Province. Secondly, the principle of State equality, as recognised in the Senates of Australia and the United States, is not strictly regarded in Canada. Whilst Ontario and Quebec are each represented by 24 Senators, the three maritime Provinces have but 24 between them (Nova Scotia 10, New Brunswick 10, Prince Edward Island 4). The Provinces that joined the Federation at a later date received even less consideration. Manitoba, Alberta and Saskatchewan have but 4 Senators each, British Columbia 3. The departure from the principle of State equality was due to Canada's horror of an assertion of "State rights"—a feeling acquired as a result of the civil war in the United States.

Comparison with  
Australia.

The Senate is in still another respect on a less democratic basis than is the case in Australia, in that a Canadian Senator must have a property qualification of £800. He must be at least thirty years of age, and a resident in the province which he represents. Absence for the whole of two consecutive sessions entails the loss of his seat.

The Relative  
Powers of the two  
Houses.

The relative powers of the two Houses are those common to most constitutions of the British people. They have co-ordinate powers

as regards legislation, except that the Senate cannot originate or amend money bills. This chamber seems to have even lost, through disuse, the power of rejecting them. In the event of a deadlock between the two Houses the Governor-General has the power to increase the number of Senators by three or six. The additional Senators will be appointed to represent Ontario, Quebec and the maritime provinces in equal proportions. The device for dealing with deadlocks will probably prove ineffective, or, as Egerton describes it, a "Mother Partington's mop."\*

#### THE DIVISION OF POWERS.

In respect to the division of powers between Federal and State the federal and provincial bodies, Canada is Powers. much more unified than Australia, and the provincial powers are less. This is due to the arrangement by which matters to be controlled by the provinces are definitely stated in the Constitution (the British North America Act <sup>State Powers  
(defined.)</sup> of 1867), whilst, in addition to certain specified powers, the undefined residuum is placed under the control of the Central Parliament. The Dominion regulates, amongst other matters, trade and commerce—whether

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\* Mrs. Partington, according to an anecdote related by Sydney Smith in 1831, tried to keep an unusually high tide of the Atlantic out of her house with a mop.

foreign, interstate or intra-state—railways, canals, fisheries, criminal law, banking, and even public works within a province if they are for the general advantage of the nation. A province controls its own taxation and revenue, its own lands, local works, education and municipalities; it can also amend its own Constitution, except that it has no power to interfere with the appointment or office of the

The Governor-General receives his appointment from the Provincial Powers. Lieutenant-Governor of the province. This official receives his appointment from the

Governor-General, and is, as a matter of fact, in much the same relation to him as the latter is in to the British Sovereign; that is, he is the representative of the Governor-General, and is under instruction from the Dominion Government. He can veto provincial bills, or reserve them for the consideration of the Governor-General, who also may veto them at any time within twelve months of their enactment. The provinces are not in direct relation with the Crown, but only through the Governor-General. This power of veto, together with the fact that not only the Lieutenant-Governor, but also the Senators representing the province, and the judges of the provincial courts, are appointed by the Central Government and are in its pay, makes the province in a sense a dependency of the Dominion. It is only because the Governor-General exercises his powers with discretion,

and refrains from annulling bills, except when the interests of the Dominion as a whole require it, that this anti-federal dependence is not irksome to the provinces. Their horror of the cry of "State Rights" made the Canadians quite willing to entrust unusually large powers to the Federal Government.

In the matter of finance, the provinces are *Finance*, restricted to direct taxation as the method of raising revenue, whilst the Dominion may tax in any way whatever so long as no province is granted any preference over the others. In the past, however, customs and excise, with the returns from the public departments, have proved sufficient for the Dominion without resorting to direct taxation. The Provinces have direct control of their own revenue, though a portion of it consists, in accordance with the British North America Act of 1907, of subsidies from the Federal Government made up of certain fixed annual amounts varying from £20,000 to £48,000 according to population, plus additional *per capita* allowances of eighty cents for the provincial population up to 2,500,000, and sixty cents for the population in excess of that number.

#### THE JUDICIARY.

The Supreme Court of Canada, like the *The Supreme Court* corresponding bodies in the United States and

Australia, serves as the guardian of the Constitution, and thus practically decides as to the constitutionality of acts brought before it in the conduct of cases. But it does not monopolise the role of guardian, since the Governor-General, without reference to the Court, may disallow provincial bills, if in his opinion they are unconstitutional. The Canadian Supreme Court has greater powers than that of the United States in that it can hear appeals from provincial courts even though the law of one Province only is involved. By this means greater uniformity in the interpretation of law throughout the Dominion is secured. But the powers of the Court are limited in two respects. (1) Its decisions are not necessarily final, since appeals are permitted from it to the British Privy Council, and (2) appeals can be made direct from a provincial court to the Privy Council, without any cognisance of the Supreme Court.

#### AMENDMENT OF THE CONSTITUTION AND RELATION TO THE EMPIRE.

Amendment—how effected. The United States Constitution has been described as "rigid" because it cannot be altered by the ordinary process of legislation, but requires extraordinary sanctions before changes can be made. The British Constitu-

tion, on the other hand, is "flexible," because employment of the ordinary process is sufficient to amend it. The Canadian Constitution may fairly be said to stand between these two types, though if we allow of but the two classes, it must be regarded as "rigid." The Dominion Parliament cannot amend its own Constitution, neither can the people of Canada. The power of amendment rests entirely with the Imperial Parliament. By passing a bill through the two Houses in the ordinary way it can modify the British North America Act as it likes. But naturally the British Parliament will act only when it is the Canadians' expressed wish that they should do so. The one fact, however, that it is the British and not the Dominion Parliament that makes the alteration, is sufficient ground for regarding the Constitution as an instance of the "rigid" type.

Thus the Canadian Federal system is Imperial Tie. different from the more normal type of federation as it appears in the United States in that, whilst the latter is an independent power, the former is a dependency of the British Crown. A citizen of the Dominion is under a threefold authority—the State, the Dominion, and the Empire—and the last-named is supreme over the other two. The Imperial authority is exercised (1) through the sovereignty which the Imperial Parliament exercises over the whole

of the British Empire either (a) by passing legislation directly affecting the colonies, or (b) by the power of amending the colonial Constitution; (2) through the prerogative of the Crown. This expresses itself in its control of international relations, the question of peace and war, the control of military and naval forces, the appointment of the Governor-General, and its right of veto of colonial legislation—provided it is exercised within a limited time—and the right to hear appeals from provincial and federal courts.

## CHAPTER XIV.

### EUROPEAN INSTANCES.

#### (A.)—SWITZERLAND.

The Swiss Confederation is, strictly speak- Not a Confederation, misnamed. It does not at all belong to the Confederate or Staatenbund type. It is a thorough Bundesstaat or Federation, the Federal Government having direct control over the citizens. The title "Confederation" is probably a relic of the earlier Staatenbund formed in the 14th century. Since that time several leagues have been formed between the various Swiss cantons, though no real central government existed before 1798. It was then that the Helvetic Republic was established under French influence, with a single National Government substituted for the cantonal sovereignties, and the cantons reduced to the level of departments. During the next half-century various forms of union were tried. But in 1848, as the result of civil war, a loose confederacy gave place to a strong federal state, a diet of ambassadors being superseded by a Senate and National Council.

Considerable modifications in and since 1874 have still further increased the powers of the Central Government, and introduced interesting experiments in direct legislation by the people themselves by means of the referendum, and, since 1891, of the initiative.

**Democratic character of Cantonal and Federal Government.** In fact, this direct rule of the people, as distinguished from government by elected representatives, is the distinctive characteristic of the Swiss Constitution. At present there are 22 cantons, three of which are divided into half-cantons, making thereby 25 distinct bodies politic. These cantons have their own forms of provincial government, alike in the one respect of being republican. Each canton has its representative institutions, but in one only has this representative Legislature the sole power of making laws. All the others are far more advanced democratically than Australia. In six cantons the representative Council is subordinate to the Folkmoot or meeting of the entire body of citizens, and merely exists for the purpose of arranging the business for the citizens' consideration. These cantons are living instances of "pure democracies," and in comparison our Australian system of government is an "elective aristocracy," as Rousseau would have called it. In the remaining cantons the representatives have large but by no means complete legislative authority, since the refer-

endum is employed in all but one of them, being compulsory in some cases and optional in others. The Federal Constitution is very similar in many respects to the Constitution of these latter cantons. Thus, with a liberal use of the referendum, and also of the initiative (which will be described later) in some cantons, and government by Folkmoots in others, the Swiss systems are the most democratic in existence, though the history of the ancient Greek and Teutonic peoples show that they are by no means unprecedented.

#### THE EXECUTIVE.

Another peculiarity of the Swiss system of government is to be found in their method of selecting the Executive. In some cantons it is elected by the Legislature, in others directly by the people. Once elected, the executive remains in office for a fixed term. So also in the national system, the Federal Executive (Bundesrat), consisting of a President and six others, is elected for a period of three years, at a joint sitting of the two chambers of the Federal Assembly. In order to secure as wide a representation as possible, no two Ministers can come from the one canton. Generally the members of the Executive are re-elected at the end of their term of office. It is extremely rare indeed that such a

one is rejected, even though his views be divergent from those of a majority of the legislators.

**Separation of the Executive and the Legislature.**

The Swiss Executive differs from the Australian Executive in that, in the former, Ministers must not be members of the Federal Legislature (if members at the time of their elevation to the Executive, they resign from the Legislature); whereas in Australia it is one of the essential features that the Executive should consist of members of Parliament, so as to secure the dependence of the former on the latter. In Switzerland, once selected, the Executive and Legislature are to a large extent mutually independent. The Executive cannot dissolve the Legislature, the Legislature cannot control the Executive. True, the cleavage is less complete than in the United States. Ministers have power to attend and speak in the Assembly and even to introduce legislation, whilst, of course, the Legislature's function of electing the Executive provides an additional link. But the party system of government is unknown, and the Cabinet may consist of men of divergent views. Switzerland teaches the world that "The existence of political parties does not necessitate the adoption of party-government."\*

The President of the Executive has no

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\* Dicey, "The Law of the Constitution," p. 466.

power of veto over legislation, as this right belongs to the people, nor can he or any other individual control the views of the Executive, as its policy is corporate.

### THE LEGISLATURE.

The National Legislature or Federal The Nationalrat. Assembly, as it is called, consists of two Houses, (1) the National Council or Nationalrat, (2) the States' Council or Ständerat. The National Council is elected on a population basis, there being one representative for every 20,000 voters or fraction over 10,000; but each canton and half-canton must be represented by at least one member. The Council is elected for a period of three years, and the members are paid. The franchise has been made uniform by a federal law, all males over 20 years of age being allowed to vote; but until this law was passed, the various cantonal franchises obtained. The present strength of the Nationalrat is 167 members.

The States' Council (Ständerat) as the The Ständerat. name suggests, is constituted on the principle of equality of States. Each canton is represented by two members, and each half-canton by one. This gives a total of forty-four members. There is uniformity neither in the method of selecting the representatives, nor in the payment granted to them, nor in the terms

for which they retain their seats. Some members are elected directly by the people, others by the Legislatures; the term of office varies from one to three years. The explanation of this arrangement is that it assures to the fullest extent the recognition of State rights in the States' Council.

Co-ordinate  
Powers.

The powers of the two Councils are co-ordinate, and on occasions they have joint sittings. The Federal Cabinet, Judges, and Military Commander are elected by the two bodies sitting together, which in the same way also exercise judicial functions in certain cases, e.g., when the Federal Executive is concerned.

### THE PEOPLE.

The Referendum  
and Initiative.

The people of Switzerland hold the power of veto over federal legislation, and even, in a sense, the right to introduce new legislation.

(a) When a piece of ordinary legislation is passed by the Federal Assembly, the referendum is optional. But the people must be consulted when eight cantons or 30,000 voters demand it, provided the demand is made within 90 days after the bill is passed. A simple majority of voters is sufficient to secure its acceptance or rejection. The optional referendum has a decided disadvantage, in that the country is subject to agitation in the effort to

secure a sufficiency of signatures for a referendum.

(b) The referendum is compulsory for Constitutional amendments. Before the amendment can be accepted there must be, as in Australia (1) a majority of citizens, and (2) a majority of cantons in favour of the amendment.

(c) The "Initiative" may be exercised by 50,000 citizens. These citizens may compel the Assembly to consider any question, and may even themselves draft a proposed law and submit it to the whole people, without subjecting it to revision by the Assembly. The latter body, however, can at the same time submit an alternative proposal. The great weakness of, and argument against, the initiative is that a proposed measure put before the country by its means will probably be marred by serious defects, because the opportunities for thorough discussion, dissection, and consequent modification are altogether inadequate. "It is obviously impossible to take it clause by clause through a Committee of the whole people." \*

#### THE DIVISION OF POWERS.

The object of the "Confederation" is to Federal and Canadian Powers. secure independence against foreign nations.

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\* Garran, "The Coming Commonwealth," p. 139.

to maintain peace and order within, to protect liberty and the rights of the cantons, and to foster their common welfare." In order to realise this purpose, the unspecified powers are, as in Australia and the United States, exercised by the various cantons. At the same time there is a very lengthy and detailed list of matters reserved to the National Government, and consequently Switzerland may be regarded as more unified than Australia. Yet, as Garran points out, "the wider scope of the Swiss Constitution is rather a matter of legislation than of administration." As in

Cantonal Administration of Federal Laws.

Germany, the execution of federal laws is carried out partially or entirely by cantonal officials. For example, education is a matter for federal superintendence, and yet is carried on by the cantons. This peculiar feature affords one of the most striking contrasts between Anglo-Saxon and European federations. The Confederation has full control of foreign alliances and treaties, war and peace, the army, postal and telegraphic matters, trade and commerce, railways, bank note issue and the currency. It also controls the customs, except that the Constitution requires manufacturing and agricultural implements and the necessities of life to be taxed as low, and luxuries as high, as possible. It further regulates child labour in factories, hours of labour, workmen's sickness and accident insurance, the

sale of liquor, the protection of public health and laws concerning gambling. Finally, it undertakes to protect cantonal Constitutions, provided (a) they are the result of popular ratification, (b) they remain republican, and (c) they do not violate the Federal Constitution. Compliance with, or violation of, the Federal Constitution is, however, decided by the Federal Assembly and not by the Judiciary, as is the case in other modern Federations.

The financial agreement between the Central Finance, and Cantonal Governments allows direct taxation to the cantons only—a confederate idea such as we see in the American Confederation prior to 1788. The national revenue is obtained from the customs, post and telegraph returns, proceeds from the powder monopoly, and federal property. It also receives one-half of the military exemption tax, the cantons receiving the remainder. It may, if necessary—though the necessity has not yet arisen—require contributions from the cantons.

#### THE JUDICIARY.

The Federal Judiciary (Bundesgericht) of The Bundesgericht Switzerland offers a decided contrast to the system in operation in Australia. Whilst the Federal Court has both original and appellate jurisdiction in either civil or criminal cases, yet it is inferior to the High Court of Australia

Elected Judges. in two respects. In the first place, the judges are not so independent or free from political influence as in Australia, since they owe their position to election by the Federal Assembly, and may stand for re-election. The incorruptibility of the Swiss judge cannot therefore be due to the absence of external pressure. Secondly, the Federal Court is not the "Guardian of the Constitution," since the constitutionality of a federal law is decided by the Federal Assembly or by the people. The protection of cantonal rights, therefore, is not guaranteed to the same extent as are State rights in Australia, since it is the other party to the federal bargain—*i.e.*, the Central Government—that has the deciding voice on the validity of any law called into question by a canton. The arrangement is altogether un-federal, and therefore, from the federal point of view, is a serious defect in the Swiss system.

#### AMENDMENT OF THE CONSTITUTION.

##### Method of Amendment.

As has been already indicated, an amendment of the Constitution is effected in much the same way as ordinary legislation, with the additional requirement that the proposed alteration must be approved of not only by a majority of voters, but also by a majority of cantons. If 50,000 citizens, contrary to the opinion of the Federal Assembly, consider an

alteration desirable, a referendum is taken to decide between them. If the question is decided in the affirmative, the two councils are re-elected; this new Assembly revises the Constitution in the direction desired, and the proposed alterations are again submitted to the people. If accepted by them, the amendment is effected. Since, however, the Federal Assembly is judge of the validity of laws passed by itself, it seems possible to effect constitutional changes through the ordinary legislative process. In other words, the Constitution is theoretically of the "rigid" type, but in reality may prove to be "flexible."

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#### (B.)—THE GERMAN EMPIRE.

Germany, as a federation, has some peculiar features of its own to offer the student. It [1871.] has considerably modified some of the characteristics common to federal systems, but is particularly interesting as an instance of the monarchical type of federalism. Before the union could be consummated, certain State prejudices and jealousies had to be overcome, and State rulers had to be persuaded to forego a good deal of their authority. Indirectly the present German Empire was the outcome of the re-awakening of a national consciousness

due to the disastrous reverses inflicted on Austria and Prussia at Austerlitz and Jena by Napoleon. From the middle ages onwards, the "Holy Roman Empire," including most of the German States, was nominally in existence and subject to the Archduke of Austria, who was thus also Roman Emperor. But the Confederation was little more than a myth, and ceased to exist after 1806. Through the patriotic efforts of Stein, Hardenberg, and Seharnhorst, the German people were emancipated from serfdom, and a national spirit restored. Napoleon was overthrown. But owing largely to the influence of Metternich, the ultra-conservative Austrian Minister, the proposal for a firm union was defeated, and a loose confederation, not of the States, but of "the sovereign, princes and free towns of Germany" was established. The Diet was consequently not on democratic lines at all, but consisted merely of delegates appointed by the princes and rulers under whose instructions they acted and voted. Moreover, owing to the necessity for unanimity in the Diet and the absence of executive authority, the union was practically a powerless *Staatenbund* or League of States, and served merely as an instrument in Metternich's hands to repress liberal and progressive movements in Germany.

The Confederation lasted for almost exactly

half a century, though a serious attempt in 1848 to form a closer union was very nearly successful, and broke down only after the Prussian monarch had declined the Imperial title. Economic influences, however, were at work as a welding force, and thus prepared the way for political union. A Zollverein or Customs Union was formed in 1834, composed of 17 States representing over 23,000,000 people. The tariff walls between these States were knocked down so that goods could pass freely from one to another, whilst a uniform tariff was imposed on the frontier. Austria stood out of this union, and Prussia therefore became the leader.

The next series of events culminating in the Austro-Prussian war of 1866, resulted in the dissolution of the Confederation, the expulsion of Austria from Germany, and the creation of the North German Confederation composed of all the States north of the river Main. A popular Assembly or Diet gave the people a voice in the government, though the chief administrative power was placed in the hands of the Bundesrath or Federal Council, through which the will of the rulers of the constituent States could make itself felt. The King of Prussia was made President of the Federation, but not with sovereign powers. Provision was made for the subsequent inclusion of the four

southern States, Bavaria, Wurtemberg, Baden and South Hesse. These States came into line as a result of the Franco-German war of 1870-1. The "North German Confederation" was thereupon transformed into the German Empire, when William, King of Prussia, was crowned German Emperor on the 1st January, 1871. The Staatenbund or League of States had evolved into a Bundesstaat or Federal State.

**The States of the present Empire.**

The present German Empire consists of the four Kingdoms of Prussia, Bavaria, Saxony and Wurtemberg, six grand-duchies, five duchies, seven principalities and the three free cities of Lubeck, Bremen and Hamburg. These twenty-five States differ considerably from one another in area, population, and local constitutions, as well as in their relation to the Empire. The largest State is Prussia, with a population of 38,000,000, whilst the smallest is Schaumburg-Lippe, whose population is less than 50,000.

### THE EXECUTIVE.

**The German Emperor.**

The head of the State is the German Emperor (*Deutscher Kaiser*). He appoints the Chancellor, summons and adjourns the Parliament, is the Commander-in-Chief of the army, and the most potent influence in foreign

affairs. But as Imperial ruler his powers are considerably limited.

The Chancellor is the chief and, in a sense, the sole Minister. He receives his appointment from the Emperor, to whom alone he is responsible, and may be chosen irrespective of the strength of parties in the popular Assembly. He presides over the Bundesrath and in the name of the Emperor appoints the other federal officers and heads of departments. The latter are not his colleagues but subordinates. The British Cabinet system does not obtain in Germany. The Kaiser and his Chancellor conceive policies, the departmental heads carry them out, the Reichstag acts as a more or less ineffective critic. The Executive is, on the whole, independent of the legislative body, though within more recent years the Imperial Chancellor has acknowledged his obligation to recognise the will of the majority in the Reichstag.

#### THE LEGISLATURE.

At the same time the Bundesrath or *The Bundesrath*. Federal Council has important administrative and judicial functions, and, as the chamber representing the princes and rulers of the several States, has to be reckoned with in many important matters. It bears in some respects

**A Compromise.**

a close resemblance to the Diet of the earlier Confederation, since its members act under instructions from the rulers of the State they represent. They do not vote as individuals, but as States, all the delegates from any one State voting the same way, and all votes counting irrespective of the presence or absence of any delegate. The Bundesrath is based neither on the principle of State equality nor on that of proportional representation, but on a compromise between the two. Prussia has but seventeen members out of a total of fifty-eight, though its population comprises three-fifths of the total population of the Empire. Yet it is by means of the Bundesrath that Prussia maintains her predominant position, since but fourteen votes are necessary to annul any attempt to interfere with the Constitution, and she has seventeen. Bavaria has six representatives, Saxony and Wurtemberg four each, and the rest either three, two or one. In addition to its legislative function, the Council has certain administrative rights. Its consent is necessary to the declaration of offensive war, to the dissolution of the Reichstag, and to certain Imperial appointments. Every member, as a delegate of a State ruler, has the peculiar right of appearing and speaking in the Reichstag in order to represent his government's views. The Bundesrath itself sits in secret.

The Reichstag, which corresponds to our House of Representatives, is the popular House, and is elected on a population basis. Thus in a house of about 400 members, Prussia with a population of 40,000,000 is represented by 236, and Bavaria with a population of less than 7,000,000 by 48, whilst the eleven smallest States have but one member each. The House is elected for five years by German citizens over 25 years of age, though the German Emperor, with the consent of the Bundesrath, may dissolve it earlier. The members of the Federal Council may appear in the Reichstag and address the Assembly. The Chancellor himself frequently avails himself of this opportunity to explain the policy of the Executive, yet the Executive is in no way responsible to the Reichstag. Since 1906, members of this House have been paid. Bills may be introduced in either House, and the Emperor has no power of veto. The popular House interferes but little in matters of foreign policy.

#### DIVISION OF POWERS.

A prominent feature of the German Federation is the large legislative authority of the Central body, and the almost equally large administrative powers of the different States. Generally speaking, but with the exceptions referred to below, both foreign and internal

trade (whether interstate or intra-state), coinage, weights and measures, banking systems, railways, telegraph and postal matters are regulated by the Imperial Parliament. This body has the power also of making uniform the civil and criminal law as well as the judicial procedure. But the States retain considerable powers in the administration, even where the Imperial law is recognised.

For example, the army, the customs, and the post office are federal concerns, yet the equipment, drilling and routine administration of these departments are controlled by State officials. The Federal Council can require that these duties be carried out by the States. Again, most of the laws are made by the Imperial Legislature; but the Judges who are responsible for its observance receive their appointments from the States, though uniformity of interpretation of the law is safeguarded by the existence of a Federal Supreme Court to which appeal is permitted. It is for these reasons that Bryce declares, "It is a State centralised in what concerns its foreign policy, its military and naval organisations, and the larger part of its legislation, but not centralised as respects its officials whether executive or judicial."\*

State Administration of Federal Law.

No Uniformity in the Division of Powers.

Another noticeable feature in the German Constitution is the absence of uniformity in

\* Bryce, "Holy Roman Empire," p. 483.

regard to the number of powers retained by the different States. When, for example, the southern States entered the union in 1870, special concessions were made to them. Bavaria and Wurtemberg were allowed to maintain their own special postal systems, whilst the former of these two powers further insisted on controlling her own army and railways. For these reasons Bryce declares that "It is a peculiar federation, which as respects the North German members is a strict one, conceding to them few and unimportant State rights; but as regards the two greatest, Bavaria and Wurtemberg, is extremely loose, amounting to little more than a close defensive and offensive military alliance, with a joint foreign policy, a common commercial system, and a common legislation on a few topics." \*

The financial burden of imperialism is borne by the returns from customs and excise and the other federal departments. Deficiencies are made good by proportional contributions levied on the States.

#### THE JUDICIARY.

The Federal Judiciary may be here dismissed The Federal  
by briefly noticing that it does not perform <sup>Court.</sup>

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\* Bryce, "Holy Roman Empire," p. 434.

functions corresponding to those of the Supreme Court of the United States or the High Court of Australia. True, it is a Court of Appeal from the State Courts; but it does not act as the guardian of the Constitution, since it has not been provided with the power to decide on the constitutionality of a federal law.

#### AMENDMENT.

##### Method of Amendment.

The Constitution would be classed as of the "rigid" type; but it is the least rigid of its class, since amendment is secured through the ordinary legislative machinery with but slight restrictions. Fourteen votes in the Bundesrath against a proposed amendment are sufficient to secure its rejection. Thus Prussia alone, with its seventeen votes, or the four southern States with their combined sixteen representatives, or even the seventeen miniature States alone, though containing but five per cent. of the total population, would be able to block any suggested alteration in the Constitution. But, should the opposition amount to less than fourteen votes, a constitutional amendment can be effected by passing the proposal through all the stages necessary for ordinary legislation.

## GENERAL APPENDIX (I.)

Although South Africa has no proper claim to consideration in a work on federal governments, yet the country is not without some interest to the student of the Australian system. South Africa effected a Constitutional Union in 1909 which, though not federal in character, has nevertheless a federal suggestion in respect of some of the provisions governing the relation of the Union to the provinces. Partly for this reason, and partly because it affords us an instance of "unification" which, some prominent Australians assert, is the destined end of our own Commonwealth, little apology is required for appending a slight indication of the nature of the Union.

### SOUTH AFRICA.

The four British colonies in South Africa—<sup>The Motive for</sup> Cape of Good Hope, Natal, Transvaal and Orange Free State—effected a constitutional <sup>Union.</sup> Union in 1909. The circumstances leading to this solution of South African difficulties cannot be treated here. Suffice it to say that federation had been in the air for over

half a century despite the racial antipathy of Briton and Boer. A common danger from native risings necessitated a mutual understanding between the political divisions. Hence Sir George Grey advocated federal union as early as 1856. The attempt at realisation, however, proved futile, even though a bill was actually passed by the Imperial Parliament to that effect in 1877. For the next two decades intense racial antagonism, culminating in the first and second Boer wars, precluded any serious consideration of the question, but, after the surrender of the Transvaal and the Orange Free State to Great Britain, the necessity for the federal link appealed to both races. It seemed to be the best means of solving the problems connected with the native population, the tariff, and the railway rates. A conference in 1908, discussing the internecine competition of the railway companies, realised that commercial union was impossible without political union. The question was taken up generally. Closer Union

The Federal Convention. Societies were formed. A Convention, meeting at Durban and Cape Town (1908-9), and numbering amongst the representatives of the four colonies our erstwhile foes, Botha, Steyn, De la Rey and De Wet, together with Dr. Jameson and others of British race, drafted a Constitution which was submitted to the Legislatures of the respective colonies. The

language difficulty was surmounted by placing English and Dutch on a footing of equality in all official proceedings, and the Transvaal accordingly plumped for union. The question of the native vote proved serious, as hitherto natives had been entitled to vote in the Cape Colony only; but a compromise was effected, which the other colonies were prevailed upon to accept. The Act was signed by the King on the 20th September, 1909.

The four colonies have entered upon a much more unified system of government than prevails in Australia. But nevertheless, they retain a good deal of their individuality as provinces. We may assert that a slight federal element exists in the provisions which have been made for the maintenance of legislative and administrative powers by the provinces in local and specially reserved matters. For instance, there is but one Governor—the Governor-General—for the whole of the Union; but each province is furnished with a Chief Executive Officer, with the official designation of Administrator, appointed by the Governor-General for five years. Again, the Executive Council of the Union attends to the administration of such matters as were attended to by the executives of the various colonies before the Union; still the administrators are assisted by Provincial Executive Committees to carry on the admin-

A Federal suggestion.

Responsible Government—Central, but not Provincial. Registration of provincial affairs. In the case of the Union Executive the tenets of responsible government are strictly recognised, in that members of the Executive must always be men

members of the Executive must also be members of Parliament; but the members of the Executive Committees of the provinces are not necessarily members of the provincial Council though they are elected by the Council. The Administrator may act on behalf of the Governor-General without reference to the Executive; and both the Administrator and the four members of the Executive may take part in the proceedings of the Council, except that they are debarred from voting unless members of the Council. These provincial Councils may be regarded as reduced Parlia-

**Council.** Councils may be regarded as reduced Parliaments. Their continuance, numerical strength and the exercise of certain powers, are vouched for in the Constitution. The Council is elected for three years, and is not subject to dissolution during that period; it numbers as many members (provided there are not less than twenty-five) as there are representatives for that province in the Union House of Assembly; it has power to tax directly for provincial purposes, to borrow on the credit of the province, and to pass ordinances on such matters as education (primary and secondary), agriculture (to a certain extent), hospitals and charitable institutions, divisional and municipal institutions, roads, bridges, markets,

**Its Powers.**

fish and game preservation, and local works, excepting those considered as national in character. The Councillors receive remuneration.

The Union Parliament consists of the King (represented by the Governor-General), the Senate and the House of Assembly. The two Houses meet, and are prorogued and dissolved under the usual conditions of responsible government. The Senate is partly nominated <sup>The Senate.</sup> and partly elected, and consists altogether of 40 members. The Governor-General nominates eight members—four of whom are to have special ability to treat the alien race question—for ten years. Each original province is also represented by eight Senators elected for 10 years, in the first instance by a joint sitting of the two Chambers of the moribund local Legislatures, and on subsequent occasions by a joint sitting of the provincial Councillors and the members of the House of Assembly representing that province. The Union Parliament, however, is free to provide otherwise for the constitution of the Senate after the expiration of ten years. Senators must be thirty years of age, five years resident in South Africa, and British subjects of European descent. Elected Senators must possess immovable property within the Union worth at least £500. The Assembly, consisting of 121 members, and subject to increase

up to 150 with the progress of population, is chosen directly by the electors on the principle of proportional representation, though the two smaller States—Natal and the Orange Free State—have a representation slightly above that warranted by population. The difficulty of the coloured voter question was overcome by allowing natives already possessed of the suffrage to vote, and making no change in this respect unless the two Houses sitting together agree by not less than two-thirds of the total number of members upon some new departure. Members receive an allowance of £400 per annum, subject to a deduction of £3 for every day of absence from the sittings. Deadlocks between the two Houses are overcome without recourse to a dissolution by a joint sitting, after one House has twice rejected a bill of the other House.

#### Unification.

The more unified character of the South African Constitution, as compared with that of Australia, is evident by a clause which states that "Parliament shall have *full* power to make laws for the peace, order and good government of the Union."\* Such a clause dispenses with the necessity for an enumeration of the powers such as is contained in the thirty-nine articles of clause 51 of the Australian Constitution Act.

\* South Africa Act, 1909, cl. 59.

Thus we see that the provincial machinery consists of an Administrator, an Executive Committee, and a Council; whilst the Union equipment is a Governor-General, a Responsible Ministry, and a Parliament of two Houses (Senate and House of Assembly). The provinces are on a distinctly inferior footing to the States of Australia.

The Union is provided with a Supreme Court, consisting of a Chief Justice, judges of appeal and judges of the several divisions of the Supreme Court. The Supreme Courts of the provinces were reduced to provincial divisions of the Supreme Court, whilst District Courts were correspondingly reduced to local divisions. These provincial and local divisions have original jurisdiction as exercised by the corresponding courts before the Union as well as in matters in which the validity of a provincial ordinance (*i.e.*, ordinance issued by the provincial Council) is involved, or in which the Union is a party. Appeals from the Supreme Court to the King in Council are not permitted unless the King himself exercises his right to grant special leave of appeal.

The financial arrangements between the Union and the provinces are simple and undefined except on one point. Each province is to receive an amount equal to that provided in the estimates for education in the year preceding the Union, as well as such other sums

as the Governor-General considers necessary. The Provincial Executive Committees are to submit estimates of expenditure and not to exceed the amount provided. The Union assumed all provincial debts and liabilities existing in 1909, and took over all harbours and railways. Freetrade was established throughout the Union.

Constitutional  
Amendment.

The Parliament may amend its own Constitution, except that it cannot change any provision for the operation of which a definite time limit is prescribed; nor can it disturb the arrangements for the equal footing of the two languages, or for electoral qualifications, unless two-thirds of the total number of the members of the two Chambers acquiesce in such change at a joint sitting. Parliament sits at Cape Town; the seat of government is at Pretoria; whilst the principal centre for the Court of Appeal is Bloemfontein.



## GENERAL APPENDIX (II.)

### A TABULATED COMPARISON OF

#### Australia.

#### United States.

##### **THE UPPER HOUSE.**

###### **(i) Composition.**

Six Senators per State for six years (one half retiring triennially). It can be dissolved if a deadlock.

Members are at least 21 years of age, and three years resident in the Commonwealth.

Two Senators per State for six years (one third retiring triennially).

Members are at least 30 years of age, and nine years resident in the States. They must be residents in the States they represent.

###### **(ii) Method of Election.**

Elected by the people (Universal adult franchise). Each State constitutes one electoral district.

Chosen by the State Legislatures. The Vice-President of the United States President of the Senate officio.

###### **(iii) Powers.**

Co-ordinate powers with the Lower House, except that it cannot originate or amend Money Bills, though it may reject them or suggest amendments.

It cannot originate or amend or reject Money Bills. It can accept or veto the appointment of Ministers and other officers chosen by the President. It has sole power of ratifying or rejecting treaties made by the President, and equal co-ordinate powers with the Lower House in other respects. It cannot be dissolved by the Executive.

##### **THE LOWER HOUSE.**

###### **(i) Composition.**

The House of Representatives contains as nearly as possible, twice as many Representatives as there are Senators in the Senate. These are distributed between the States on a population basis, but no State is to have less than five. Present number, 75. Members have the same qualifications as electors.

The House of Representatives contains about 430 Members, distributed on population basis—one for 30,000, with minimum representation of one for each State.

Members must be at least 25 years of age, and reside in the States for seven years.

###### **(ii) How Chosen.**

Members elected by the people under a system of adult franchise. Each State is divided into a number of electorates, each returning one Member. Members are elected for three years, unless Parliament is sooner dissolved.

Members elected for three years on a population basis by electors qualified as electors.

###### **(iii) Powers.**

Sole right to originate and amend Money Bills. Equal powers with the Senate in other legislation.

Sole right to originate Money Bills and of impeachment. Co-ordinate with weaker powers in other legislation. The House can be dissolved by the Executive.

## THE FEDERAL CONSTITUTIONS.

### Canada.

89 Members, appointed for life (24 from Ontario, 24 from Quebec, and 24 from the three Maritime Provinces. A smaller number from other Provinces). Neither State Equality nor Proportional Representation adhered to. Members must be 30 years of age, resident in the Provinces they represent, and owning £500 worth of freehold.

Nominated by the Governor-General.

It cannot originate or amend Money Bills; and does not even reject them.

Co-ordinate powers with the Lower House in other legislation.

The House of Commons. Quebec's representation fixed at 65, and that of the other Provinces in proportion to population. Present number, 221.

Members are elected in each Province according to the electoral system provided by the Province. Uniform franchise in the Dominion was established in 1885, but withdrawn in 1898. Members are elected for five years subject to earlier dissolution.

Sole power to originate Money Bills. Co-ordinate powers with the Senate in other legislation.

### Switzerland.

44 Members in the Ständerat (States' Council), two Members from each Canton, one Member from each Half Canton. Varying terms of office from one to three years.

Method of election varies in each Canton; the Members in some Cantons are elected by the people, in others by the Cantonal Legislatures.

Co-ordinate powers with the Nationalrat in all respects. It elects the Federal Cabinet, Judges, and the Military Commander conjointly with the Nationalrat, and similarly decides on the constitutionality of laws.

The House cannot be dissolved by the Executive.

The Nationalrat elected on a population basis, one Member to 20,000 voters, or fraction of that number greater than one-half. Minimum representation is one per Canton, or Half Canton. Present number, 167.

Members were elected by Cantonal electors until a Federal law gave uniform franchise. Now all males over 20 years are electors. Elected for three years.

Similar power to those of the Ständerat, and sits with the latter to decide election cases, conflicts of jurisdiction, or questions of pardon, or elect the Federal Council, but otherwise has no control over the Council. The House cannot be dissolved by the Executive.

### Germany.

58 Members in the Bundesrat (Federal Council). Neither State Equality nor Proportional Representation adhered to, but a compromise. Prussia has 17 Members, Bavaria has six, Saxony and Wurtemberg four, and the others, three, two, or one each.

Appointed by the State Governments for periods suitable to each Government.

Co-ordinate powers with the Reichstag in legislation, but it has additional powers in that its consent is necessary for offensive wars, treaties, the dissolution of the Reichstag and certain Imperial appointments. Members may speak in the Reichstag.

The Reichstag elected on a population basis. (Prussia has 236 representatives, Bavaria 48, eleven small States one each). Total number of Members, 397.

Members elected by citizens over 25 years of age who are not in active military or naval service.

Members elected for five years subject to earlier dissolution by the Kaiser with the consent of the Bundesrat.

Co-ordinate powers with the Bundesrat in legislation, but subordinate to the latter in other respects. It has no control over the Executive.

## GENERAL APPENDIX (II.)

### A TABULATED COMPARISON OF

#### Australia.

#### United States.

##### DEADLOCKS.

If the House of Representatives twice passes a measure (with an interval of three months between) and the Senate rejects or amends it so that the Lower House cannot accept it, the two Houses can be dissolved. If no agreement between the Houses, a joint sitting is held, at which an absolute majority decides the disputed question.

No provision.

##### THE EXECUTIVE.

Selected from the party supported by a majority of the Representatives. It is collectively responsible to the Lower House for its administration. Limited to seven Ministers and a remuneration of £12,000.

President (native born, at least 35 years of age, and 14 years resident in the States) and Vice-President elected for four years by "Electors" appointed by each State. The President is not responsible to Congress except that his treaties and appointments need Senate's confirmation. He appoints the Ministers who are responsible individually to him.

##### THE JUDICIARY.

The High Court has original jurisdiction in cases affecting treaties, Consuls, between States or Members of different States or against Federal officers or in disputed elections.

It has appellate jurisdiction in cases from (i) its own judges, (ii) other Federal Courts, (iii) State Supreme Courts, and (iv) the Interstate Commission. Appeals allowed to British Privy Council only with the sanction of the High Court. It decides on the constitutionality of Federal and State laws in the course of cases being considered.

Supreme Court has jurisdiction concerning Ambassadors, Public Ministers and Consuls, and in Interstate controversies or those in which the Nation is concerned. It does not hear appeals when the citizens of one State only are concerned.

## THE FEDERAL CONSTITUTIONS.

### Canada.

No provision beyond the power possessed by the Governor-General to increase the numbers by three or six.

As in Australia, except that the number and remuneration of Ministers is not limited.

Supreme Court shares with Governor-General the power to declare on the constitutionality of Provincial measures. It may hear appeals between the States, or where only one State is concerned or where Federal law or officer is concerned. Appeals may be made to the British Privy Council from its decisions, or by the Provincial Courts without reference to the Federal Court.

### Switzerland.

No provision for deadlocks between the two Houses. But if a deadlock between the Legislature and the people occurs, a Referendum is employed to enable people to veto a measure passed by the Legislature. Eight Cantons or 30,000 voters may demand such a Referendum, and a simple majority decides the question. Fifty thousand voters may also compel legislation on a question, and may submit a measure to the vote of the people, though the Legislature may submit an alternative measure on the same question at the same time.

A President and six others elected for three years by the two Houses of Legislation at a joint sitting. No two Ministers from the one Canton. Re-election is usual. The Party system is not in operation. Once elected, they are independent of the Legislature, except that they may speak and introduce legislation in the Nationalrat.

The Court has original and appellate jurisdiction, but is not the Guardian of the Constitution. The Judges are elected by the Federal Assembly.

### Germany.

No provision.

The Kaiser is the Head of the Executive and the Chancellor, his Chief Minister, is appointed by, and is responsible to, him. The Executive is independent of the Legislature except as regards foreign treaties and offensive wars which need the assent of the Bundesrat.

A Court of Appeal to hear cases brought up from the State Courts. But it does not decide the question of the constitutionality of laws.

## GENERAL APPENDIX (II.)

### A TABULATED COMPARISON OF

#### Australia.

#### United States.

#### RELATION OF THE FEDERATION TO THE STATES.

Certain defined powers are given to the Commonwealth (some exclusively, others concurrently with the States). The undefined residue of powers remains with the States. Where the two have concurrent powers, the Federal legislation takes precedence of State legislation.

The Commonwealth hands to each State a per capita sum of 25 shillings per annum for each inhabitant. It also protects the State from foreign and domestic violence and exempts State property from Federal taxation.

(i) An absolute majority of each House is first necessary, or the proposal must be passed twice by one House (with a three months interval) if rejected by the other House.

(ii) The measure is then submitted to Referendum and becomes law if

(a) A majority of electors in a majority of States, and

(b) A majority of all the electors voting are in favour of the measure.

Federal powers are defined and limited, and the undefined residue remains with the States. The States yield precedence to the Nation in matters of concurrent powers.

There is no financial connection between the Federation and the individual States.

#### THE AMENDMENT OF THE CONSTITUTION.

Two thirds of the Members of each Federal House or two thirds of the State Legislatures may propose an amendment. This becomes law if three quarters of the State Legislatures or special State Conventions approve of it.

## THE FEDERAL CONSTITUTIONS.

### Canada.

Provincial powers are defined and limited; the undefined residue being controlled by the Nation. Provincial Lieutenant-Governors, Judges, and the Senators are appointed by the Governor-General, who can also veto Provincial legislation.

The Dominion subsidises the Provinces by stated sums plus per capita sums of either 60 or 80 cents, according to the population.

Amendments are made by the Imperial Parliament. No special provision made.

### Switzerland.

The undefined powers are under Cantonal control; yet it is more unified than Australia, because a larger list of powers are reserved to the Federal Government. Federal laws are largely administered by Cantonal officials.

The Confederation protects the Cantonal constitutions that are (i) popular, (ii) republican, and (iii) do not conflict with the Federal Constitution.

The Confederation may, if necessary, demand Cantonal contributions.

Parliament or 50,000 electors may propose an alteration. The proposal takes effect if

(a) A majority of electors in a majority of Cantons, and

(b) A majority of all the electors voting are in its favour.

If the Houses disagree as regards a proposed alteration, a referendum is taken. If the result favours alteration the two Houses are dissolved and re-elected to prepare the measure. This is followed by another referendum on the measure when it is prepared, and the measure becomes operative if the referendum is favorable.

### Germany.

The relation of the Nation to the State varies with the State. State rights are few in the North, whilst Southern States have reserved greater powers to themselves.

Federal laws and even the routine administration of some Federal departments are carried out by State officials.

The Nation may call on the States to make good Federal financial deficits.

Amendment is secured by the ordinary process of legislation except that an Opposition of 14 in the Bundesrat is sufficient to defeat a proposed constitutional amendment. Thus the Kaiser through his seventeen representatives can prevent change.



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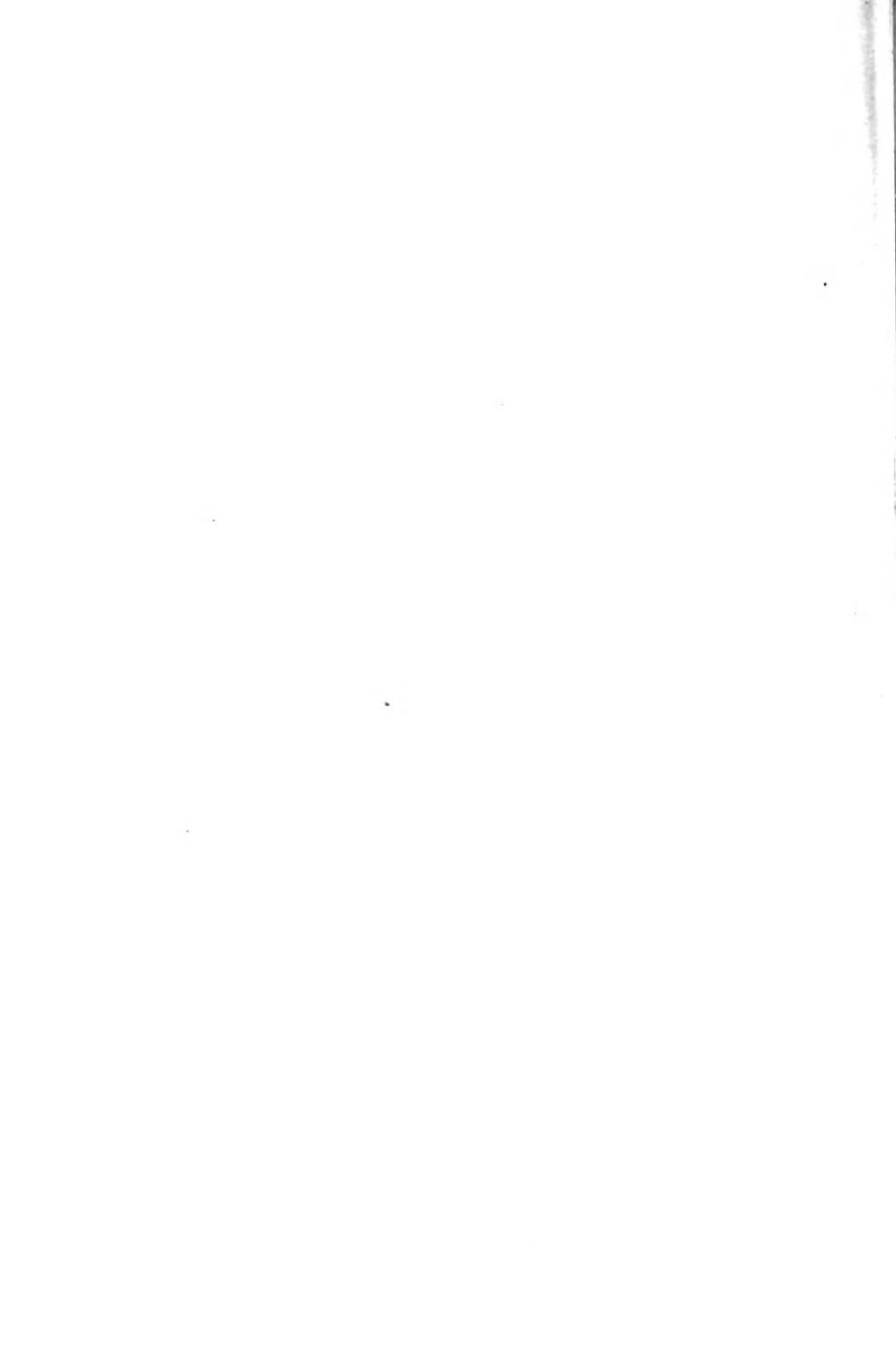
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